Supreme Court, U.S.
FILED
96 469 SEP 23 1996
OFFICE OF THE CLERK

No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ELECTRO-VOICE, INCORPORATED,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Gerard C. Smetana*
Law Offices of
Gerard C. Smetena
39 S. LaSalle, Suite 1218
Chicago, IL 60603
(312)357-0250
* *Counsel of Record for Petitioner Electro-Voice, Incorporated*

Niel M. B. Rowe
RYAN & NELSON, LTD
444 E. Algonquin Road
Suite 130
Arlington Heights, Il 60005

Michael E. Avakian
CENTER ON NATIONAL
LABOR POLICY
5211 Port Royal Road Suite 103
North Springfield, VA. 22151
(703)321-9180

Thomas J. Barnes
VARNUN RIDDERING
SCHMIDT & HOWLETT, LLP
Bridgewater Place,
P.O. Box 352
Grand Rapids, MI 49501

PRESS OF BYRON S. ADAMS ♦ WASHINGTON, D.C. ♦ 1-800-347-8208

QUESTIONS PRESENTED

Did the Seventh Circuit err in holding that the Regional Director of the National Labor Relations Board ("Regional Director") is not required to establish reasonable cause as a prerequisite for seeking injunctive relief under Section 10(j) of the National Labor Relations Act, 29 U.S.C. §160(j), contrary to decisions of the Courts of Appeal for the First, Second, Third, Fourth, Fifth, Sixth, Eighth and Tenth Circuits and contrary to the necessary implications of the statute?

Did the Seventh Circuit err in effectively eliminating the Regional Director's burden of proof and in establishing a "better than negligible chance of success on the merits" standard for prevailing on an unfair labor practice charge as a prerequisite for the district court to grant interim injunctive relief under Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j) especially in cases where the interim relief sought is essentially the final relief sought, contrary to decisions of the Courts of Appeal for the First and Ninth Circuits?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Saundria Bordone, Regional Director of the Twenty-Fifth Region of the national Labor Relations Board, for and on behalf of the National Labor Relations Board,

Appellant,

Electro-Voice, Inc., a wholly owned subsidiary of Mark IV Audio, Inc.,

Appellee.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE 6

ARGUMENT 8

I. The Seventh Circuit erred in holding that the Regional Director of the National Labor Relations Board ("Regional Director") is not required to establish reasonable cause as a prerequisite for seeking injunctive relief under Section 10(j) of the National Labor Relations Act, 29 U.S.C. §160(j), contrary to decisions of the Courts of Appeal for the First, Second, Third, Fourth, Fifth, Sixth, Eighth and Tenth Circuits and contrary to the necessary

implications of the statute. 9

II. The Seventh Circuit erred in effectively eliminating the Regional Director's burden of proof and in establishing a "better than negligible chance of success on the merits" standard for prevailing on an unfair labor practice charge as a prerequisite for the district court to grant interim injunctive relief under Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j) especially in cases where the interim relief sought is essentially the final relief sought, contrary to decisions of the Courts of Appeal for the First and Ninth Circuits. 13

III. Because this Case is one capable of repetition yet evading review, the questions presented here are not moot. 16

TABLE OF AUTHORITIES

Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967) . . . 11, 13

Arlook v. S. Lichtenberg & Company, 952 F.2d 367 (11th Cir. 1992) 11

Boire v. Pilot Freight Carriers, 515 G.2d 1185 (5th Cir. 1975) 11

Bordone v. Electro-Voice, Inc., 879 F. Supp. 919 (N.D. Ill. 1995) 11

Calatrello v. "Automatic" Sprinkler Corporation of America, 55 F.3d 208 (6th Cir. 1995) 11

Eisenberg v. Lenape Products, 781 F.2d 999 (3rd Cir. 1985) 11

Johnston v. J.P. Stevens & Company, 341 F.2d 891 (4th Cir. 1965) 11

Kinney v. International Union of Operating Engineers, Local 150, 994 F.2d 1271 (7th Cir. 1993) 9, 10

Kinney v. Pioneer Press, 881 F.2d 485 (7th Cir. 1989) . 9, 10

Miller v. California Pacific Medical Center, 19 F.3d 449, 457 (9th Cir. 1994) 10, 15, 17

News and Background, 146 LRR 513 (Bureau of National Affairs, August 22, 1994) 12

News and Background, 148 LRR 257 (Bureau of National Affairs, March 6, 1995) 12

News and Background, 152 LRR 353 (Bureau of National Affairs, July 22, 1996) 12

Pye v. Sullivan Brothers, 38 F.3d 58, 63 (1st Cir. 1994). 15

Rivera-Vega v. Conagra, Inc., 70 F.3d 153 (1st Cir. 1995) 11, 15, 16

Silverman v. Major League Baseball Player Relations Committee, Inc., 67 F.3d 1054 (2nd Cir. 1995) 11

Solien v. Merchants Home Delivery Service, 557 F.2d 622 (8th Cir. 1977) 11

Squillacote v. Graphic Arts International Union, AFL-CIO, 540 F.2d 853 (7th Cir. 1976) 10

Squillacote v. Local 248 Meat & Allied Food Workers, 534 F.2d 735, 741 (7th Cir. 1976) 10

*Szabo v. P*I*E Nationwide, Inc.,* 878 F.2d 207 (7th Cir. 1989) 10

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") is reported at 83 F.3d 1559, 152 L.R.R.M. (BNA) 2145 (7th Cir. 1996) and is reprinted in the appendix hereto ("App.") at page 1a. By order filed April 26, 1996, the Seventh Circuit granted the National Labor Relation Board's motion to withdraw its Motion to Dismiss Appeal as Moot and to Vacate the District Court's Opinion. App. 78a

The opinion of the United States District Court for the Northern District of Indiana, ("District Court") issued on May 4, 1995, is reported at 1995 WL 353146, 149 L.R.R.M. (BNA) 2476 (N.D. IN. 1995). The Judgment of the District Court is reprinted in the appendix at page 38a; and the opinion of the District Court is reprinted in the appendix at 39a.

STATEMENT OF JURISDICTION

On April 26, 1996, the United States Court of Appeals for the Seventh Circuit issued a written opinion and judgment reversing the decision of the United States District Court for the Northern District of Indiana and remanding the case to the District Court.

On July 18, 1996, Mr. Justice Stevens allowed an extension of time for filing this Petition for Writ of Certiorari to and including September 23, 1996.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 10(j) of the National Labor Relations Act, as amended (29 U.S.C. § 160(j)), provides:

> (j) The board shall have the power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Section 10(*l*) of the National Labor Relations Act, as amended (29 U.S.C. § 160(*l*)), provides:

> (*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such

charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 158 (b) (7) of this title if a charge against the employer

under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

STATEMENT OF THE CASE

On October 18, 1994, the General Counsel of the National Labor Relations Board issued a complaint against Electro-Voice, Inc. ("Electro-Voice") alleging that Electro-Voice had engaged in unfair labor practices in violation of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. § 158(a)(1), (3) and (5). Thereafter, on December 20, 1994, the Regional Director of the National Labor Relations Board ("the Director") filed a petition for temporary injunctive relief against Electro-Voice pursuant to Section 10(j) of the Act, 29 U.S.C. § 160(j).

On May 5, 1995, the District Court denied the Director's petition for temporary injunctive relief. In denying the Director's petition, the District Court held that the Director failed to establish that the injunctive relief requested was "just and proper" as required by Section 10(j) of the Act. 29 U.S.C. § 160(j). App., 50a. The District Court applied the traditional test in equity to determine if the requested relief was "just and proper." App., 50a. One part of that test is an evaluation of the Director's likelihood of success on the merits. While recognizing that it lacks jurisdiction to decide the ultimate merits of the unfair labor practice case (App., 51a), the District Court held that the Director failed to establish its likelihood of success on the merits because the evidence presented to the District Court was equivocal or unclear. App., 61a.

The Director appealed the decision of the District Court to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit reversed, holding that the District Court applied an incorrect legal analysis and that the Director Demonstrated "a better than negligible chance" of prevailing on the merits. App. 15a. In concluding that the District Court applied the incorrect standard, the Seventh Circuit stated:

> "The district court concluded that '[i]f the evidence of unfair labor practices is 'equivocal' or 'unclear,' the court should deny the petition for 10(j) relief.' The district court clearly applied a preponderance of the evidence standard. The court relied, in part, of [sic] *Johnston v. J.P. Stevens & Co.*, 57 L.R.R.M. (BNA) 2322, 2326 (W.D.S.C. 1964), *enf'd*, 341 F.2d 891 (4th Cir. 1965). * * * The rule in *Johnston* is not the law of this circuit. Therefore, the district court applied the incorrect standard. In the context of a § 10(j) petition, the Director need not prove her case by a preponderance of the evidence. * * * For our purposes, we must decide whether the Director has a better than negligible chance of success: whether the director has "some chance" of succeeding on the merits.

App., 16a-17a.

The United States District Court for the Northern District of Indiana had jurisdiction in this case pursuant to 29 U.S.C. § 160(j) and 28 U.S.C. § 1345.

ARGUMENT

Contrary to the decisions of almost every other Court of Appeals, the Seventh Circuit has effectively given the Regional Directors of the National Labor Relations Board (N.L.R.B.) carte blanch in seeking and obtaining interim injunctive relief pursuant to Section 10(j) of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. § 160(j).

The Seventh circuit has eliminated the "reasonable cause" threshold that is applied by every other circuit except the Seventh and Ninth, and that before 1989 was applied uniformly throughout the courts. Moreover, in clear conflict with decisions of the First and Ninth Circuits, the Seventh Circuit has held that the Regional Director need only present evidence sufficient to establish a better than negligible chance of prevailing on the merits of the underlying unfair labor practice charge.

The issues set forth above are important questions of federal law that should be but have not been decided by the Supreme Court. The current administration of the N.L.R.B. has expressed and demonstrated a clear intention to increase its use of Section 10(j) interim relief. As a result, employers are more frequently being subjected to injunctive relief, including requirements of taking affirmative remedial action, while unfair labor practice charges remain pending and unresolved in N.L.R.B. adjudication process. The only procedural protection standing between the employer and the requests of the Regional Director is the standard of review applied to the Regional Director's request by the District Court.

This Petition should be granted because it presents important questions of federal law upon which the Seventh Circuit has ruled in conflict with the other Circuits. Moreover, while many of the circuits may appear to be in agreement on one or both of these questions, the specific applications of the law in the various Courts of Appeal show that these questions are, in large part, unsettled among the Courts of Appeal.

I. The Seventh Circuit erred in holding that the Regional Director of the National Labor Relations Board ("Regional Director") is not required to establish reasonable cause as a prerequisite for seeking injunctive relief under Section 10(j) of the National Labor Relations Act, 29 U.S.C. §160(j), contrary to decisions of the Courts of Appeal for the First, Second, Third, Fourth, Fifth, Sixth, Eighth and Tenth Circuits and contrary to the necessary implications of the statute.

In following its prior decisions in *Kinney v. Pioneer Press,* 881 F.2d 485 (7th Cir. 1989) and *Kinney v. International Union of Operating Engineers, Local 150,* 994 F.2d 1271 (7th Cir. 1993), the Seventh Circuit did not require that the Regional Director establish that it had reasonable cause to seek interim injunctive relief. In the present case, the Seventh Circuit stated,

> "In *Pioneer Press* we outlined the prevailing standard for evaluating § 10(j) petitions: the district court should issues an injunction before

> the Board has adjudicated a case where such equitable relief is 'just and proper'" [Citation omitted.] App., 12a.

In *Pioneer Press*, the Seventh Circuit engaged n a prolonged discussion of its prior holdings regarding "reasonable cause" and finally concluded that no showing of reasonable cause was required under Section 10(j). *Pioneer Press*, 881 F.2d at 493. The Court restated this position in dicta in *Local 150*. 994 F.2d at 1276. In reaching this conclusion, the Seventh Circuit expressly overruled its prior holdings in Section 10(j) injunction cases.[1]

The Ninth Circuit has now followed the Seventh Circuit's lead in rejecting the reasonable cause analysis for injunctions under Section 10(j). *Miller v. California Pacific Medical Center*, 19 F.3d 449, 457 (9th Cir. 1994).

In rejecting the reasonable cause standard, the Seventh Circuit aptly explained it importance. Specifically, in *Pioneer Press* the court stated,

> "Reasonable cause under 10(l) thus serves two functions: it requires the Board to investigate before filing suit, and it allows the Board to filter out claims of violations that do not justify litigation."

Pioneer Press, 881 F.2d at 489. This very rationale likewise demonstrates the importance of the reasonable cause

---

[1]*See, e.g., Szabo v. P*I*E Nationwide, Inc.*, 878 F.2d 207 (7th Cir. 1989); *Squillacote v. Graphic Arts International Union, AFL-CIO*, 540 F.2d 853 (7th Cir. 1976); *Squillacote v. Local 248 Meat & Allied Food Workers*, 534 F.2d 735, 741 (7th Cir. 1976).

determination in Section 10(j) cases. Absent the standard, the N.L.R.B. has no constraint on its ability to bring Section 10(j) petitions against employers.

Moreover, absent the reasonable cause standard, the party against whom the injunction is sought has no means of testing the Regional Director's decision to bring the petition. For example, in ruling upon the Regional Director's motion to quash certain subpoena's issued in this case, the district court concluded that because there is no "reasonable cause" analysis in Section 10(j) cases, the employer was not entitled to discovery relating to the Regional Director's investigative process. *Bordone v. Electro-Voice, Inc.*, 879 F. Supp. 919 (N.D. Ill. 1995).

With the exception of the Ninth Circuit, every other Court of Appeals has held that the "reasonable cause" standard constitutes the first step in the district court's determination of whether to grant Section 10(j) injunctive relief.[2]

---

[2]*See, e.g., Rivera-Vega v. Conagra, Inc.*, 70 F.3d 153 (1st Cir. 1995) (In order to establish probable cause, the N.L.R.B. must show that its position is fairly supported by the evidence.); *Silverman v. Major League Baseball Player Relations Committee, Inc.*, 67 F.3d 1054 (2nd Cir. 1995) (The court must first determine that the N.L.R.B. has reasonable cause to believe an unfair labor practice has occurred.); *Eisenberg v. Lenape Products*, 781 F.2d 999 (3rd Cir. 1985) (same); *Johnston v. J.P. Stevens & Company*, 341 F.2d 891 (4th Cir. 1965) (Affirming without discussion decision of district court which applied reasonable cause standard); *Boire v. Pilot Freight Carriers*, 515 G.2d 1185 (5th Cir. 1975); *Calatrello v. "Automatic" Sprinkler Corporation of America*, 55 F.3d 208 (6th Cir. 1995); *Solien v. Merchants Home Delivery Service*, 557 F.2d 622 (8th Cir. 1977); *Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967) (Reasonable cause is an implicit prerequisite for injunctive

The current administration of the N.L.R.B. has both stated and demonstrated that it intends to be far more activist in seeking interim relief under Section 10(j). In the five months preceding the administration of the current general counsel of the N.L.R.B., the Board sought 10(j) relief in only 18 instances. In the first six months of his administration, however, an additional 43 petitions were authorized. *News and Background*, 146 LRR 513 (Bureau of National Affairs, August 22, 1994). Similarly, from June 1994 until March 1995, 121 requests for authority to seek 10(j) relief were submitted to the current Board. All of those requests were granted; and 96 petitions were actually filed resulting in 67 court orders of 10(j) interim relief. *News and Background*, 148 LRR 257 (Bureau of National Affairs, March 6, 1995). By contrast, from fiscal year 1992 through the first five months of fiscal year 1994, authorization requests were submitted in 45 cases per year resulting in the filing of 42 10(j) cases annually. *Id.*

By contrast, the late Frank McCulloch, general counsel during the Kennedy and Johnson administrations firmly believed that Section 10(j) was an extraordinary remedy that should be used "not as a broadsword, but as a scalpel, ever mindful fo the dangers inherent in conducting labor-management relations by way of injunctions." *News and Background*, 152 LRR 353 (Bureau of National Affairs, July 22, 1996).

In view of the N.L.R.B.'s current posture toward the use of Section 10(j) injunctions, it is essential to the concept

---

relief under Section 10(j)); and *Arlook v. S. Lichtenberg & Company*, 952 F.2d 367 (11th Cir. 1992).

of due process that the Board be required to meet some minimal threshold of legitimacy before instituting a Section 10(j) proceeding. Having eliminated the "reasonable cause" threshold, there is now no check upon the N.L.R.B. in the Seventh Circuit requiring it to show that it has sufficiently investigated a matter before initiating a Section 10(j) proceeding.

Moreover, while the Tenth Circuit has not recently addressed this issue, its explanation for the application of the reasonable cause standard remains persuasive. In *Angle v. Sacks*, that Court concluded that a finding of reasonable cause was an implicit prerequisite for relief under section 10(j). 382 F.2d at 658. That court recognized that while Section 10(j) does not contain the same explicit language as Section 10(*l*) regarding reasonable cause, the same requirement must, by reasonable implication, be applied to petitions for relief under Section 10(j).

Without the reasonable cause standard, the respondent in a 10(j) proceeding has no means to test the Boards reasonableness in seeking the relief, no means of testing whether the Board properly followed its own procedures in reaching the determination to seek 10(j) relief. The Seventh Circuit has departed from the path followed by every other Court of Appeals except the Ninth Circuit and has rejected that check. Accordingly, the Supreme Court should grant this Petition for Certiorari and conclude that the N.L.R.B. is requires, as a threshold matter, to show that it had reasonable cause for seeking relief under Section 10(j) of the Act.

II. The Seventh Circuit erred in effectively eliminating the Regional Director's burden of proof and in

establishing a "better than negligible chance of success on the merits" standard for prevailing on an unfair labor practice charge as a prerequisite for the district court to grant interim injunctive relief under Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j) especially in cases where the interim relief sought is essentially the final relief sought, contrary to decisions of the Courts of Appeal for the First and Ninth Circuits.

In determining whether the injunctive relief sought by the Regional Director was "just and proper" as required under Section 10(j), the Seventh Circuit properly stated that the Court was to apply traditional equitable principles. App., 12a. Those principles as set out by the Court are:

> "(1) no adequate remedy at law, (2) irreparable harm absent an injunction that exceeds the harm suffered by the other party as a result of the injunction, (3) a reasonable likelihood of success on the merits, and (4) 'harm to the public interest stemming from the injunction that is tolerable in light of the benefits to be achieved by the relief."

App., 12a.

In applying these standards, the Court properly noted that the district court lacks jurisdiction to reach the merits of the underlying unfair labor practice charge. App., 12a. However, the Court then went on to hold that the Regional "Director need only present evidence sufficient to tip the

scales in her favor, nothing more is required." App., 12a. The Court then held that while the Director is required to establish the first two elements by a preponderance of the evidence, a sliding scale applies to the remaining two elements. That is, assuming sufficient harm absent an injunction, the Director need only establish that the Director has a "better than negligible chance of succeeding on the merits. App. 14a-15a. Again the Court stated that the Director must show that she has "some chance" of succeeding on the merits. App., 17a.

Granting, for the purposes of this petition, that the Director presented significant evidence of unfair labor practices, the Seventh Circuit held that the District Court erred in applying any weighing or critical view of the evidence. Essentially, the Circuit Court has held that the district court must accept wholesale the Directors view of the evidence.[3]

In this case, the relief sought by the Regional Director included an interim bargaining order. App., 71a. In effect, a requirement that Electro-Voice bargain with the union in question is the final relief that the Director seeks to obtain before the N.L.R.B.

In *Conagra, Inc.*, the Ninth Circuit held that where the interim relief sought by the Regional Director is essentially the same as the final relief sought, the showing of likelihood of success on the merits should be strong. 70 F.3d at 164.

---

[3]At the request of the Director, the District Court decided this case based on the transcript of testimony given before the N.L.R.B. administrative law judge, contrary to the express policy of Section 7 of the Norris Laquardia Act. 29 U.S.C. § 107.

See also, Pye v. Sullivan Brothers, 38 F.3d 58, 63 (1st Cir. 1994).

While, in *California Pacific* the Ninth Circuit followed the Seventh Circuit's lead in eliminating the reasonable cause standard, it has not followed the Seventh Circuit in eliminating the Director's burden of proof. Rather, it has stated that the level of belief needed to proceeded to Court ("some proof" does not equate with the level of proof required to succeed in court. 19 F.3d at 456. Similarly the Ninth Circuit concluded that while the Courts of Appeal are required to allow deference to the N.L.R.B. in reviewing final orders, the district courts are not required to allow the same deference in determining whether to grant injunctive relief. *Conagra, Inc.*, 19 F.3d at 449.

In this case, the Seventh Circuit has concluded that the district court may not weigh conflicting evidence and that the directors burden is only a negligible chance of success on the merits. The question must be asked, then, what discretion remains in the hands of the district court. Contrary to its pronouncements otherwise, the Seventh Circuit has effectively determined that the Regional Director is entitled to any relief that she can request with a straight face.

Because the decision of the Seventh Circuit is in clear conflict with those of the First and Ninth Circuits on this important question, the Supreme Court should grant this petition and establish a standard whereby the Regional Director must make a strong showing of her likelihood for success on the merits in order to obtain Section 10(j) injunctive relief.

III. Because this Case is one capable of repetition yet evading review, the questions presented here are not moot.

Ultimately, the N.L.R.B. found against Electro-Voice on the merits of the unfair labor practice charges. Review of that finding is currently pending before the Seventh Circuit. Because the N.L.R.B. has reached final adjudication, the underlying injunction is no longer of any purpose. However, were that state of affairs to preclude review by this Court, it would never be able to address the proper standards for granting Section 10(j) relief. See discussion in *California Pacific* addressing the issue of mootness in this context. 19 F.3d 453-454.

For all of these reasons, the Petitioner requests the Supreme Court to grant the Petition for Certiorari in order to decide these two important question of federal law upon which the Circuit Courts are in conflict and in so doing to reverse the decision of the Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

Gerard C. Smetana*
LAW OFFICES OF
GERARD C. SMETENA
39 S. LaSalle, Suite 1218
Chicago, IL 60603
(312) 357-0250
**Counsel of Record for Petitioner Electro-Voice, Incorporated*

Michael E. Avakian
CENTER ON NATIONAL
LABOR POLICY
5211 Port Royal Road, Suite 103
North Springfield, VA 22151
(703) 321-9180

Neil M. B. Rowe
RYAN & NELSON, LTD
444 E. Algonquin Road
Suite 130
Arlington Heights, IL 60005

Thomas J. Barnes
VARNUM RIDDERING SCHMIDT
& HOWLETT, LLP
Bridgwater Place, P. O. Box 352
Grand Rapids, MI 49501

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-2611

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

ELECTRO-VOICE, INCORPORATED,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division
No. 94 C 1037 — **Robert L. Miller, Jr.,** *Judge*

Argued Jan. 11, 1996
Decided April 26, 1996*

Before ESCHBACH, COFFEY, and EVANS, *Circuit Judges.*

ESCHBACH, *Circuit Judge.* The United States brought a petition in federal district court on behalf of the Regional

---

* This opinion originally was released in typescript form.

Director of the National Labor Relations Board (collectively "the Director") requesting injunctive relief and a bargaining order pursuant to § 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j) (hereinafter "the Act"). In support of the petition, the Director presented evidence that the employer threatened plant closure, interrogated employees regarding union activity, solicited employees' grievances, remedied employees' grievances, and fired union organizers. The district court denied injunctive relief. Because we conclude that the district court based its decision on incorrect legal analysis and clearly erroneous factual findings, we REVERSE.

I.

Electro-Voice, Inc.,[1] is a manufacturing company, with plants located in several locations: Buchanan, Michigan; Sevierville, Tennessee; Newport, Tennessee; and Mishawaka, Indiana. At the plant located in Mishawaka, Indiana, (hereinafter "the Indiana plant"), Electro-Voice manufactures fiberglass stadium horns, electronic cross-over panels, and cables for military headsets. In June of 1994, the Indiana plant was home to approximately 30 production and maintenance employees. Plant Manager Dennis Northam and General Foreman Paul Grasso supervised the Indiana operation. Minnie Warren was the Human Resources Manager of the plant in Buchanan, Michigan. Although she was located in Michigan, she had oversight responsibility for human resources at the Indiana plant.

Around the beginning of 1992, Electro-Voice implemented a program called "Customers Are Our Real Employers," referenced by the acronym "CARE." The

---

[1] Electro-Voice, Inc.'s parent company is Mark IV Audio, Inc. In the interest of clarity, we shall refer to them collectively herein as "Electro-Voice" or "the company."

program was a form of "total quality management," designed to solicit the input of employees at all levels of the company regarding how to improve the quality of the company's products. Under the auspices of CARE, Electro-Voice regularly held employee meetings to solicit employees' concerns and questions on issues ranging from technology and equipment to the employees' work environment. Dennis Northam was responsible for implementing CARE at the Indiana plant. Northam informed Director of Quality Anthony Sawyer, who was responsible for the CARE program company-wide, that employees in the Indiana plant did not want to participate in formal CARE meetings. Therefore, Northam said he would implement CARE informally, if at all.

Implementation of the CARE program was not the only problem plaguing the Indiana plant. In late 1993, the Indiana plant experienced a decline in labor efficiency.[2] In January or February of 1994, employees began to voice their dissatisfaction with conditions at the plant. One of the employees, Pam Buford, phoned Minnie Warren to request a meeting with Warren to discuss the policies and conditions at the Indiana plant. Specifically, Buford indicated that employees were dissatisfied with Northam, the attendance policy, and working conditions in the plant. Unfortunately, Warren was too busy to address the matter. Two weeks later Northam and Grasso met with Indiana plant employees, telling employees that they knew that the employees had complained about conditions in the plant, and stating that no changes would be made. In May, employees approached supervisor Kathy Nash to request additional exhaust fans to

---

[2] Electro-Voice concedes that the efficiency problem was "largely the result of mismanagement by Northam, who had all but abandoned the CARE process." (Appellee's Brief at 5).

alleviate the excessive heat and air pollution in the plant. Again, their request was denied.

In May, after receiving no response from her complaints, Buford began an effort to organize Indiana plant employees to form a union. First, she approached almost all of the employees at the plant. Next, in early June, Buford contacted Dana Fere, a representative of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (hereinafter "the union"). On June 17, Buford and Fere held a meeting at a nearby restaurant; sixteen plant employees attended. The employees discussed the possibility of organizing, and agreed to meet again. Meanwhile, by early June of 1994, Warren had received other complaints about the Indiana plant, including allegations of employee drug use.

On June 21, Indiana plant employee Scott Ressler played golf with Ronald Graham.[3] Graham was the Vice President of Human Resources for Electro-Voice and maintained his office at the Michigan plant. Ressler told Graham that the Indiana plant was suffering as a result of Northam's mismanagement and that attendance at the plant was becoming a "joke." According to Warren, Ressler also told Graham that "there were some union rumors" in the Indiana plant.

Graham returned to the Michigan office, and ordered Warren to go to the Indiana plant and to individually

---

[3] Graham claims that he played golf with Ressler on June 1st. He also claims that the game occurred one week after June 14. (Joint Appendix at 311). It appears that Graham's reference to June 1 was an error, and that the game occurred on June 21.

interview plant employees.[4] The parties offer different explanations for why Graham sent Warren. The Director maintains that Graham told Warren to defuse the union effort. Electro-Voice maintains that Warren was sent to address employee complaints and to investigate the drug allegations. Regardless, on June 22, 1994, Warren met with employees at the Indiana plant, informing them that she would meet with them individually over the next few days to discuss problems at the plant.[5]

Also on June 22, twenty-one employees attended a second union meeting. The employees signed union authorization cards and gave them to union representative Al Warzecha. Eleven employees volunteered to serve on a union organizing committee,[6] including Michelle Kincses, Scott Kendall, David E. Shaffer, Jason Havens, Pam Buford, and Tracy Dermody. As the meeting concluded, employee Kevin Wolverton arrived. Wolverton was not invited to the union meeting. Apparently angry about receiving no invitation, Wolverton said that Northam knew about the meeting and would fire anyone involved in the union effort.

On June 23 through June 29, 1994, Warren met with employees individually. During the interviews Warren asked employees whether they had any complaints. Employees complained about their working environment, the ventilation

---

[4] Graham maintains that Warren was ordered to conduct individual interviews to conceal from Northam employees' comments and identities.

[5] Electro-Voice concedes that Warren had heard rumors of union organizing activities prior to meeting with employees at the Indiana plant.

[6] The committee functioned to inform employees about the union effort.

in the plant, the lack of proper tools, and the absentee policy. Warren promised to investigate the complaints. However, Warren also allegedly discussed the union on at least three occasions. December Barrows claims that Warren said that Warren was once in the union and that the union would not help employees in the Indiana plant. Warren allegedly told Michelle Kincses that her personal experience suggested that the union was of little or no help to workers. Warren also supposedly inquired of Kincses whether Kincses would vote for the union and whether a majority of employees would do so. According to Scott Kendall, Warren told him that the union lacked the support of enough employees to unionize. Warren denies making any of these statements.

On June 27, Electro-Voice terminated Northam. Jay Melton, the Director of Manufacturing and Northam's superior, replaced Northam. Melton met with the Indiana plant employees, promising to improve conditions and review the attendance policy. Melton also allegedly vowed that the Indiana plant would never be a union shop.[7] According to Barrows and Kincses, Melton threatened to close the Indiana plant if the employees organized, noting that the Texas plant would take over the work of the Indiana plant. Finally, according to Tracy Dermody, Melton said that a union was not able to either protect the employees' jobs or secure for them higher wages. Melton contends that he spoke only from prepared note cards that contain no reference to the union.[8] Melton claims that he was unaware of the union effort until June 28, 1994, when he was informed of union activity by plant employee Don Simon.

---

[7] Employees Jason Havens and Tracy Dermody maintain that Melton made the statement during his speech to employees.

[8] At least two other plant employees have no recollection of Melton making the alleged statements.

Electro-Voice concedes only that during the speech Melton pledged to "give serious consideration to [employees'] concerns" and discussed "the need to produce quality products at a competitive price."

On June 29, Melton held another meeting with Indiana plant employees. Although the purpose of the meeting supposedly was to discuss the CARE program, Electro-Voice concedes that Melton discussed the union effort, said that "there was no need for a union," and encouraged employees not to give up their independence. Melton also discussed the consequences to the plant of "not remaining competitive." Again, employees claimed that anti-union threats were made. Melton denies making any threats.

Following the June 29 meeting, Melton joined Warren to continue conducting individual interviews with employees. Melton allegedly asked questions regarding employees' grievances, and renewed his verbal assault on the union. Melton allegedly told Tracy Dermody that "the Union can't protect your job" and that the plant was "small and movable." Melton allegedly made similar comments to Kincses, and asked whether Kincses or any other employee had signed a union authorization card. Warren and Melton jointly met with Pam Buford. They allegedly inquired whether Buford was responsible for organizing the union activity or knew who was. According to Buford, they assured her that the company would not tolerate the unionization of the Indiana plant. Warren and Melton deny the charges.

Warren returned to the Michigan plant following the June 29 meetings. Warren claims that she reported to Graham that the absenteeism problem in the Indiana plant was serious. On June 30, 1994, however, the company's "absentee point system" for tracking employee absenteeism was made less restrictive. Meanwhile, back in Indiana, Buford held another

union organizational meeting on July 5, 1994 to determine whether the employees wanted to continue the union effort in the light of Warren's and Melton's meetings. All but one of the 12 to 15 employees who attended the meeting voted to proceed.

On July 7, Graham, Grasso, Melton, and Warren met at the Indiana plant. Just after the meeting started, Melton presented Graham with a letter from the union demanding recognition at the Indiana plant. After receiving the letter, Graham decided that any employee with a high incidence of absenteeism should be discharged.[9] Graham ordered terminated every employee at the Indiana plant who had accumulated more than seven absentee points or who had been employed by the company for less than six months and had accumulated "a good number of points."[10] Graham ordered the terminations despite the fact that the company's written attendance policy provided that employees are subject to discharge after accumulating thirteen or more points in a twelve month period.[11] In fact, the company's absentee policy provided that "an absentee control policy and procedure is necessary to assure that those who are excessively absent are

---

[9] While serving as Vice President, Graham had never personally participated in the discharge of an hourly employee.

[10] Graham never defined how many points equal a "good number" of points.

[11] The company's attendance policy provided for progressive discipline for absenteeism. Employees received "one point" for each absence, regardless of the reason for the absence. Under the terms of the policy, the third point resulted in a verbal warning, the fifth point resulted in a written warning, the seventh point resulted in a one-day suspension, the tenth point resulted in a five-day suspension, and the thirteenth point resulted in the employee's discharge.

notified. . . ." But the employees Graham terminated received no notice that they were at risk of termination. Conveniently for the company, the employees that met Graham's criteria were December Barrows, Tracie Bentley, Pam Buford, Tracy Dermody, Jason Havens, Scott Kendall, Michelle Kincses, Sherry Mize, and Debbie Lello. Each of the foregoing had attended a union meeting and signed a union card. Five of the nine had volunteered to serve on the organizing committee.[12] Graham asserts that the decision was in response to employees' viewing the attendance policy as a "joke" and threats by key employees to quit if the policy was not enforced. Graham also disavows any knowledge of the terminated employees' union activities.

The employees were immediately fired and replaced by personnel from a temporary employment service.[13] On July 8, the union held another meeting. This time, only one or two company employees attended. The turnout was small, despite some evidence that support for the union among plant workers remained high. Other company employees informed a union representative that they feared losing their jobs. After the terminations, the company continued to remedy employee

---

[12] Another Indiana plant employee, David Shaffer, was terminated by Grasso on July 6. Shaffer also had attended union meetings and signed a union card. When Shaffer inquired whether he was terminated because of his union activities, he claims that Grasso smirked. The letter of termination given to Shaffer was identical to the letter given to the employees terminated on July 7. Electro-Voice maintains that Shaffer's termination was not linked to the terminations on July 7. According to Grasso, Shaffer's termination was justified because he fought with a co-worker, broke several thousand dollars worth of horns, and missed work twice — all in eight weeks.

[13] One employee who met Graham's criteria, Debbie Lello, was spared. After intervention by Warren on Lello's behalf, an exception was made for Lello because her absences were the result of protracted divorce proceedings.

objections in the Indiana plant, including providing the fans and tools requested by employees, and adding seating in the employee break room. No union meetings have been held since the meeting on July 8.

Also on July 8, the union filed an unfair labor practice charge, alleging that Electro-Voice terminated six of the employees for engaging in union activity, and that Electro-Voice interfered with or coerced employees for engaging in union activity. On July 19, the charge was amended to include all ten employees terminated — including David Shaffer who was terminated on July 6. The amended charge also alleged that Electro-Voice threatened to close the Indiana plant if the employees unionized. On August 30, 1994, the union filed a second amended charge requesting a bargaining order and injunctive relief pursuant to § 10(j). On October 18, 1994, the Director issued a complaint, charging Electro-Voice with violations of §§ 8(a)(1), (3) and (5) of the Act, 29 U.S.C. § 158(a)(1), (3) and (5), including: (1) unlawful discharge, (2) unlawful plant closing threats, (3) unlawful statements regarding the "futility" of union organization, (4) unlawful solicitation of complaints and promises of benefits, (5) unlawful surveillance of union activity, and (6) unlawful granting of benefits. In October, following the Director's complaint, the company reinstated employees Bentley, Kincses, Dermody, and Mize.

On December 19, 1994, an Administrative Law Judge (hereinafter "ALJ") began hearing the case. The next day, December 20, the United States petitioned the federal district court for injunctive relief on behalf of the Director pursuant to § 10(j). The ALJ completed his hearing on January 19, 1995. The transcript of the proceedings before the ALJ was submitted to the district court. At the request of the Director, the district court did not conduct an evidentiary hearing; the

court heard no live testimony. Rather than conducting a formal hearing, the district court relied on the record before the ALJ supplemented with additional evidentiary materials.

On May 4, 1995, 1995 WL 353146, the district court denied the Director's petition. The court held that: (1) the Director had no chance of success on the merits, (2) the harm to the company from an injunction outweighed the potential harm to the employees, (3) the employees would not be irreparably harmed absent an injunction, and (4) an injunction was not in the public's interest.[14] On June 5, 1995, the ALJ reached a conclusion that directly contradicts the district court's ruling. The ALJ found Electro-Voice guilty of all charges except surveillance. Electro-Voice filed exceptions to the ALJ's opinion. Those exceptions are still pending before the National Labor Relations Board (hereinafter "the Board").

The Director brought this timely appeal from the district court's order denying injunctive relief. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1).

II.

The Director seeks equitable relief: an "extraordinary remedy." *Szabo v. P*I*E Nationwide, Inc.*, 878 F.2d 207, 209 (7th Cir.1989). Section 10(j) relief should be granted "only in those situations in which the effective enforcement of the NLRA is threatened by the delays inherent in the NLRB dispute resolution process." *Id.* Beyond the extraordinary nature of the relief sought, on appeal the Director must show

---

[14] The district court also found that the Director was unlikely to prevail on the surveillance claim. The Director does not appeal that conclusion.

that the district court abused its discretion in finding that injunctive relief is not "just and proper."[15] *Id.* In other words, we review the lower court's decision to see "whether it depends on faulty legal premises, clearly erroneous factual findings, or improper application of the criteria governing preliminary injunctive relief." *Kinney v. Pioneer Press*, 881 F.2d 485, 493 (7th Cir.1989). Nonetheless, the Director maintains that the lower court made legal errors and clearly erroneous factual findings that warrant reversal. We agree.

In *Pioneer Press*, we outlined the prevailing standard for evaluating § 10(j) petitions; the district court should issue an injunction before the Board has adjudicated a case where such equitable relief is "just and proper." *Id.* at 491. In determining what is just and proper, the district court should "evaluate the propriety of the Director's request with an eye toward the traditional equitable principles that normally guide such an inquiry." *Id.* at 490. We also outlined the four traditional criteria that a party must demonstrate in order to obtain injunctive relief: (1) no adequate remedy at law, (2) irreparable harm absent an injunction that exceeds the harm suffered by the other party as a result of the injunction, (3) a reasonable likelihood of success on the merits, and (4) "harm to the public interest stemming from the injunction that is tolerable in light of the benefits achieved by the relief." *Id.* at 490 n. 3. These criteria, or derivations thereof, have served as the prerequisites to § 10(j) relief. *Cf. Kinney v. Int'l Union of Operating Engineers, Local 150, AFL-CIO*, 994 F.2d 1271,

---

[15] We note that the district court did not hear live testimony. The total record relied on by the district court is before us on appeal. Because the district court did not have the opportunity to observe the demeanor of the witnesses, we need not be especially reluctant to hold that the district court reached clearly erroneous results. *See Best Medium Publishing Co., Inc. v. National Insider, Inc.*, 385 F.2d 384, 386 (7th Cir.1967).

1275 (7th Cir.1993) (applying a slight variation of the aforementioned equitable criteria).

In the context of a § 10(j) petition, a federal court has no jurisdiction to pass on the merits of the underlying case before the *Board. Squillacote v. Graphic Arts International Union, Local 277*, 513 F.2d 1017, 1021 (7th Cir.1975). Rather, considering the aforementioned factors (including the Director's likelihood of success on the merits), the court's mission is to determine whether the harm to organizational efforts that will occur while the Board considers the case is so great as to permit persons violating the Act to accomplish their unlawful objectives, rendering the Board's remedial powers ineffectual. *Cf. Pioneer Press*, 881 F.2d at 487 ("If the delay [is] long enough, or the sin grave enough, the Board's order might come too late to do any good."). The Director is not entitled to prevail simply because she brings a charge.[16] But once the Director presents evidence sufficient to tip the scales in her favor, nothing more is required. "[N]o rule of law limits injunctive relief to 'serious and extraordinary circumstances.'" *Id.* at 493.

---

[16] The Director asserts that our inquiry is limited to whether contested factual issues could be resolved in the Director's favor, and that the Director is entitled to the benefit of the doubt. The Director relies on our holding in *Local 150*. In *Local 150*, we explained that the "reasonable cause" inquiry in § 10(l) analysis is limited to whether the Director could prevail on contested questions of fact, and noted that the Director is entitled to the benefit of the doubt. *Local 150*, 994 F.2d at 1278. The district court rejected the Director's argument, noting that in *Pioneer Press* we held that the "reasonable cause" inquiry is no longer a threshold requirement of § 10(j) analysis. Pioneer Press, 881 F.2d at 493. Our holding in this case does not turn on whether we give deference to the Director's interpretation of the facts. Thus, we decline to decide the issue.

A. The Director's Burden of Proof.

The parties in this case agree that the aforementioned equitable criteria apply. However, they disagree over the applicable burden of proof. Electro-Voice maintains that the Director must establish each of the criteria by a preponderance of the evidence. The court below agreed, proclaiming that "the Seventh Circuit rejected the more lenient 'sliding scale approach'" in *P*I*E Nationwide, Inc.* The Director argues that § 10(j) analysis requires "sliding scale" analysis. Under the Director's approach, a weak showing under one of the equitable criteria can be offset by a stronger showing under another criterion. Because this issue seems to be the source of considerable confusion, we believe it requires clarification.

The equitable relief pursuant to § 10(j) is essentially a preliminary injunction. *P*I*E Nationwide, Inc.*, 878 F.2d at 209 (referring to § 10(j) relief as "temporary relief or a restraining order"). In *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386-87 (7th Cir.1984), we outlined the burdens incumbent upon a party seeking a preliminary injunction. In the context of a § 10(j) petition, we have compressed those requirements into a four-part test. First, the Director must show that she has no adequate remedy at law. *Id.* at 386. In other words, she must show that an award of damages would be "seriously deficient." *Id.* Second, the Director must demonstrate that "public harm" would result absent the injunction. *P*I*E Nationwide, Inc.*, 878 F.2d at 210. Third, the Director must show that the labor effort would be irreparably harmed absent the injunction, and that the irreparable harm outweighs any irreparable harm to the employer. *Roland Machinery Co.*, 749 F.2d at 386-87. The Director must satisfy the first two requirements by a preponderance of the evidence. The Director must also show

irreparable harm by a preponderance of the evidence. However, the Director need not demonstrate that the harm to the labor effort outweighs the harm to the employer if the Director makes a strong showing under the fourth requirement. The fourth requirement is that the Director show that she has some likelihood of succeeding on the merits — that she has a "better than negligible" chance of winning. *Id.* at 387. Once the Director establishes some likelihood of success, "the court must then determine how likely that success is, because this affects the balance of relative harms. . . . The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor. . . ." *Id.* at 387. In other words, a strong showing by the Director of likely success on the merits can offset a weak showing of harm.

As the foregoing makes clear, "sliding scale" analysis can occur only between the likelihood of success and the balancing of the harms. A strong showing under one can only off set a weaker showing under the other. A strong showing of likelihood of success or harm does not effect the Director's burden as to the other equitable criteria. The Director must satisfy the other criteria by a preponderance of the evidence.

B. The Likelihood of Success on the Merits.

Having clarified the requisite analysis, we can turn to the merits of the case. We will address the equitable factors as they were considered by the district court. First, we consider whether the Director demonstrated a likelihood of success on the merits: a better than negligible chance of prevailing.

1. Violations of Section 8(a)(3) of the Act.

Section 8(a)(3) of the Act prohibits employers from terminating employees solely on the basis of their union activities or sympathies. 29 U.S.C. § 158(a)(3). The employer's motivation for terminating employees is critical to the

determination whether the terminations violate the Act. *N.L.R.B. v. So-White Freight Lines, Inc.*, 969 F.2d 401, 406 (7th Cir.1992). Where the evidence before the Board, circumstantial or otherwise, demonstrates that the discharges were driven by anti-union animus, the employer must demonstrate that he would have terminated the employees for the proffered reason irrespective of union activity. *Northern Wire Corp v. N.L.R.B.*, 887 F.2d 1313, 1318 (7th Cir.1989). The Director bears the burden of proving to the Board by a preponderance of the evidence that the terminations were motivated by a desire to thwart protected activity. *Chicago Tribune Co. v. N.L.R.B.*, 962 F.2d 712, 716 (7th Cir.1992). Once the Director meets her burden, the burden shifts to the employer to demonstrate by a preponderance of the evidence that he would have terminated the employees irrespective of the protected activity. *Id.* at 718.

The district court concluded that "[i]f the evidence of unfair labor practices is 'equivocal' or 'unclear,' the court should deny the petition for § 10(j) relief." The district court clearly applied a preponderance of the evidence standard. The court relied, in part, of *Johnston v. J.P. Stevens & Co.*, 57 L.R.R.M. (BNA) 2322, 2326 (W.D.S.C.1964), *enf'd*, 341 F.2d 891 (4th Cir.1965). In *Johnston*, the employer fired 14 of the 50 employees who notified the employer that they had joined a union. The court refused to issue a § 10(j) injunction because the evidence was equivocal whether the employer's conduct violated the law. The rule in *Johnston* is not the law of this circuit. Therefore, the district court applied the incorrect standard. In the context of a § 10(j) petition, the Director need not prove her case by a preponderance of the evidence. As we have already noted, in the context of § 10(j) petitions, the district court lacks the jurisdiction to reach the merits of the underlying claim. The Board will determine whether the Director has proven her case by a preponderance

of the evidence. For our purposes, we must decide whether the Director has a better than negligible chance of success: whether the Director has "some chance" of succeeding on the merits. *Local 150*, 994 F.2d at 1279; *see Zipp v. Caterpillar, Inc.*, 858 F.Supp. 794, 798- 99 (C.D.Ill.1994).

The evidence in this case clearly demonstrates that the Director has a "better than negligible" chance of prevailing on the merits. The Director presented testimony to suggest that Graham knew about union activity in the Indiana plant before he sent Warren to interview the employees. Testimony of some of the employees also suggests that Warren and Melton asked employees to identify union supporters. Electro-Voice concedes that Warren reported the information to Graham upon her return to the Michigan plant. The terminations followed shortly thereafter. From these circumstances, the Board could infer that Graham knew the identities of union supporters when he fired the employees on July 7.

Electro-Voice maintains that the employees were terminated to decrease absenteeism and increase efficiency. However, the Director presented evidence to suggest that Electro-Voice's explanation is pretextual. Graham had no clear standard for terminating employees; he terminated employees who were with the company less than six months who accumulated "a good number of points." Graham claimed that the reason for the July 7 meeting was to discuss the attendance policy because the policy "seemed too stringent." (Joint Appendix at 325). In fact, the attendance policy was amended and made less restrictive on June 30. But at the meeting in July, Graham applied an undefined standard to terminate the employees. Though Graham admitted that the attendance policy was too stringent, he terminated the employees without reviewing their files to consider whether they were victims of the policy's severity. Graham's actions,

viewed in the light of his stated purpose for the meeting, simply make no sense. The implausibility of Graham's explanation lends credence to the Director's theory of the case. *N.L.R.B. v. Industrial Erectors, Inc.*, 712 F.2d 1131, 1137 (7th Cir.1983). Further, after the terminations, efficiency at the Indiana plant continued to plummet until October of 1994 — the same month that Electro-Voice rehired four of the employees supposedly responsible for the efficiency problems.

Electro-Voice argues that because its other plants are unionized, and it has a history of cooperation with the union, the Director's accusations are implausible. But the Director introduced evidence suggesting that Electro-Voice had a financial incentive to thwart union development at the Indiana plant. The company risked losing the contracts for the products it manufactured at the Indiana plant if its costs of production rose any further. According to Graham, "we had a situation with those products, where it was marginal whether or not they were in fact — whether in fact we could continue to be competitive with them." (Joint Appendix at 334). Higher operating costs in the form of increased employee benefits and wages often follow unionization. If the Indiana plant unionized, the company stood to loose business.

The district court held that "the Board is quite likely to find that Electro-Voice has established by a preponderance of the evidence that it would have discharged the employees regardless of their protected activity." The court based its conclusion upon its determination that Graham decided to terminate the employees because of absenteeism, and that the terminations were in conformity with Electro-Voice's attendance policy. Again, the test is whether the Director has a better than negligible chance of proving her case. We have already demonstrated that the Director's evidence seriously

calls into question whether "attendance" was a pretext for the terminations. Further, the district court's conclusion that the terminations were necessarily in compliance with Electro-Voice's attendance policy is clearly erroneous. Although the policy reserved to the company the right to terminate employees with less than 13 absentee points, the circumstances of these terminations appear to be significantly distinct from the manner in which the company has terminated other employees. In this case, a vice-president of the company unilaterally formulated an imprecise standard to fire a block of employees, without notice to the employees and without reviewing their personnel files. Electro-Voice concedes that no other terminations at the company have occurred in that fashion.

Electro-Voice also argues that three of the employees, Havens, Kendall and Shaffer, were careless, wasted a lot of time at the plant, and allegedly lied on their employment applications. According to Electro-Voice, these factors served as partial motivations for terminating the employees. Electro- Voice claims that "there is direct proof that the discharge decisions were based not only on issues of 'attendance,' but also, were based on issues of 'quality, productivity, . . . and work record.'" (Appellee's Brief at 25). The "direct proof" Electro-Voice refers to is the typed statements provided to the employees upon termination. The statements read, in part, "This review of the situation included quality, productivity, attendance, and work record." However, there is a substantial amount of evidence to contradict Electro-Voice's claim; the cornerstone of Electro-Voice's defense is that all of the terminations except Shaffer's were motivated by employee absenteeism. What is more, the very forms Electro-Voice refers to list "absenteeism" as the sole "nature of offense."

In sum, the timing of discharges and the manner in which the terminations were carried out, viewed in the light of the evidence suggesting that the company engaged in other anti-union practices and acted with anti-union animus, establish that the Director has a better than negligible chance of prevailing on the merits. The district court's conclusion to the contrary is clearly erroneous.[17]

We should emphasize that we express no opinion on the merits of the case itself. Our holding should not be taken as a finding in favor of the Director on the merits. Electro-Voice offers a plausible explanation for the terminations, and presented compelling evidence in support of its case. Just as there are credibility questions regarding Electro-Voice's witnesses, there are credibility questions regarding the Director's witnesses. Our presentation of the evidence herein is focused on the strength of the Director's evidence only because our inquiry is limited to whether the Director has a better than negligible chance of success. Our holding is similarly limited to a finding that the Director has such a chance.

2. Violations of Section 8(a)(1) of the Act.

Next we turn to the Director's likelihood of success on the charges that Electro-Voice wrongfully solicited employee grievances, questioned employees about union activity, and threatened plant closure. Section 8(a)(1) of the Act provides that an attempt by an employer to interfere with, restrain, or

---

[17] We note that the circumstances surrounding Shaffer's termination are sufficiently distinct to warrant separate consideration. Electro-Voice presented evidence that Shaffer destroyed several thousand dollars worth of equipment, and would have been terminated regardless of his union activity. We concur with the district court that the Director has failed to establish a better than negligible chance that an anti-union animus motivated Shaffer's termination.

coerce employees engaged in the process of unionization constitutes an unfair labor practice. 29 U.S.C. § 158(a)(1). We have held that the solicitation of employees' grievances combined with pledges to remedy those grievances with the intent of thwarting unionization violates § 8(a)(1). *N.L.R.B. v. Berger Transfer & Storage Co.*, 678 F.2d 679, 691 (7th Cir.1982). Likewise, granting benefits with an eye toward curbing union organization violates § 8(a)(1). *N.L.R.B. v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 625 (7th Cir.1981). Threatening plant closure or other reprisals for union activity violates § 8(a)(1) because "these acts reasonably tend to coerce employees in the exercise of their rights, regardless of whether they do, in fact, coerce." *Northern Wire Corp. v. N.L.R.B.*, 887 F.2d 1313, 1317 (7th Cir.1989). Employers also violate § 8(a)(1) when they interrogate employees about their union activities in circumstances that tend to interfere with organizational efforts. *N.L.R.B. v. Shelby Memorial Hosp. Ass'n*, 1 F.3d 550, 559 (7th Cir.1993).

Given our holding as to the terminations, we will address the remaining claims with brevity. The evidence clearly demonstrates that Electro-Voice solicited employee grievances, pledged to address the grievances, and acted to remedy the grievances. The only question is whether the Director has a better than negligible chance of proving that the company took these actions with the intent of thwarting the union effort. We have already discussed evidence that would support a finding that the company acted with anti-union animus.

The district court concluded that the Director has no chance of success on the merits because the employee interrogations were part of the company's "past and current policy, if not practice, of soliciting employee grievances." *See Ichikoh Mfg., Inc.*, 312 N.L.R.B. 1022, 1024, 1993 WL 406323 (1993), *enf'd*, 41 F.3d 1507 (6th Cir.1994). Specifically, the court held

that the interrogations were consistent with the company's CARE program. Although we agree that some evidence suggests that the interrogations were carried out pursuant to CARE, the record clearly provides sufficient evidence from which the Board could conclude that they were not. First, Northam notified Dennis Sawyer that at best CARE would be implemented "informally" at the Indiana plant. Second, by the time Melton replaced Northam, the company knew that the CARE program was foreign to Indiana plant employees. Third, interrogating employees about their union activity and deriding the union is unacceptable regardless of whether it is part of a past and current policy. Yet the Director presented evidence suggesting that such questions were proffered during the CARE "interviews." Finally, it appears that individually interrogating every employee at a plant over a period of a few days is at variance with the way in which CARE was implemented at the company's other plants. The Director has a better than negligible chance of establishing that the employee "interviews" violated the Act.

The district court also concluded that the changes made by Electro-Voice in response to employees' complaints were minor, and cannot seriously be said to have changed employees' views. However, whether a change is "minor" depends on who is asked. Electro-Voice removed Northam: a man that Electro-Voice describes as a tyrant. Electro-Voice also made changes at the plant, such as providing employees with ventilation fans, in direct response to employees' complaints. A gift of a fan to a polar bear is insignificant. A fan becomes a major concession when offered to a laborer in a sweltering factory who is subjected to air pollution which causes skin irritation. The Indiana employees were the latter, not the former. The district court's conclusion that the nature of the concessions preclude a finding that they were offered to change employees' views is clearly erroneous.

Likewise, the Director introduced evidence via employee testimony that the Indiana plant's management threatened to close the plant if the employees organized, pledged that the plant would never be a union shop, and questioned employees about union activity in circumstances that could reasonably intimidate the employee with regard to union activity. Again the district court denied that the Director could prevail.[18] The problem, according to the district court, is that the company presented evidence contradicting the evidence presented by the Director. The court reasoned that whether the threats were made ultimately turns on determinations of credibility. According to the district court, where the question "rests on credibility alone" a court cannot find it probable that the threats were made. As we stated above, the district court applied the incorrect legal standard. Although the parties presented conflicting testimony, the Director proceeded under established legal theories and presented evidence sufficient to demonstrate that she has a better than negligible chance of prevailing before the Board.

3. Violations of Section 8(a)(5) of the Act.

The Director also contends that Electro-Voice violated § 8(a)(5) by refusing to recognize the union and engaging in conduct likely to undermine the union's majority support after

---

[18] The alleged questioning of the employees regarding union activity was conducted in individual interviews by the Indiana plant's management. Among other things, the alleged questioning pertained to the identity of persons involved in the union effort. The questions allegedly led some employees involved with the union to deny their involvement. Finally, the record is devoid of evidence to suggest that the employees were assured that no reprisals would result from their responses. If the witnesses making these allegations are found credible by the Board, that finding would support a determination that the questioning violated the Act. *Shelby Memorial Hosp. Ass'n*, 1 F.3d at 559.

the union properly requested recognition based on a "card based majority." Section 8(a)(5) of the Act provides that it is unlawful for an employer to refuse to bargain collectively with the representatives of his employees. 29 U.S.C. § 158(a)(5). In *Berger Transfer & Storage Co.*, we held:

> Although an employer generally has a right to refuse to recognize [a union based upon] a card based majority and to demand an election, an employer who engages in unfair labor practices "likely to destroy the union's majority and seriously impede the election" may not insist that before it bargains an election be held. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 600, 89 S.Ct. 1918, 1933, 23 L.Ed.2d 547 (1969). Therefore, when a union requests recognition and bargaining from an employer which was presented with cards showing a majority support for the union, and the employer subsequently engages in unfair labor practices which destroy the "laboratory conditions" needed for a fair election, the employer forfeits any right to an election and must bargain with the union or violate section 8(a)(5) of the Act.

Berger Transfer & Storage Co., 678 F.2d at 693. The Board has the remedial power to issue a bargaining order where the employer's practices "have the tendency to undermine majority strength and impede the election process." *Id.* (citing Gissel Packing Co., 395 U.S. at 614, 89 S.Ct. at 1940).

The district court concluded that the Director presented no evidence to demonstrate that the alleged acts undermined the union's chances of conducting a free and fair election. That conclusion is clearly in error. On June 22, twenty-two Indiana plant employees signed union authorization cards. Evidence suggests that on June 23, Electro-Voice began engaging in unfair labor practices. The day the union requested recognition, July 7, Electro-Voice fired one-third of

its work force in the Indiana plant. As we will discuss below, the Director presented evidence that Electro-Voice's conduct had a substantial chilling effect on union activity in the Indiana plant. Further, the Director presented evidence that Electro-Voice's alleged conduct was pervasive, ranging from threats of plant closure to employee terminations. As we noted in *Justak Bros. and Co., Inc. v. N.L.R.B.*, 664 F.2d 1074 (7th Cir.1981), "[c]ommon sense recognizes the dramatic and long term effects" of such activity. *Id.* at 1082. We find that the Director has a better than negligible chance of establishing that Electro-Voice violated § 8(a)(5) of the Act, and a better than negligible chance of obtaining a bargaining order from the Board.

C. Irreparable Harm, Balancing the Equities, & the Adequacy of a Remedy at Law.

Next we turn to the equities of the parties. First, we must consider whether absent an injunction the employees' union effort will suffer irreparable harm. The Director argues that irreparable harm clearly will result from the chilling effect on the union effort, *P*I*E Nationwide, Inc.*, 878 F.2d at 210, and from the loss to employees of collective bargaining in the interim, *Asseo v. Pan American Grain Co.*, Inc., 805 F.2d 23, 27 (1st Cir.1986). We agree.

The district court concluded that the alleged chilling effect is "mere speculation at best." We do not understand how the district court reached that conclusion. The facts of this case demonstrate that the events at the Indiana plant have had a remarkable chilling effect on the employees' efforts to organize. On June 22, 1994, twenty-one Indiana plant employees attended a union meeting and signed union authorization cards. Several employee meetings, employee interrogations, and employee terminations later, and employee participation in the union effort has ground to a halt.

Apparently no union meetings have occurred since July 8, 1994. There is some evidence that the employees reinstated by Electro-Voice in October of 1994 were considering an attempt to reorganize the union effort at the time the district court considered the case. However, the Director maintains, and Electro-Voice does not challenge, that no such meetings occurred and no union literature has been distributed. One union official testified that several employees are afraid to re-attempt union organization--afraid that they will be terminated because of their union efforts. The union official's testimony was corroborated by the testimony of other Indiana plant employees who remain employed by Electro-Voice.

The district court found no risk to the employees' unionization effort, concluding that "the dischargees, all but one of whom testified that they would return to Electro-Voice even if they found other employment, will be able to return to their positions and start up in the same place they left off with union organizing activities." The district court's conclusion turns a blind eye to the effect of the passage of time. As this case demonstrates, years may pass before the Board reaches the merits of a case. As time passes the likelihood of union formation diminishes, and the likelihood that the employees will be irreparably deprived of union representation increases. The "dischargees" will seek, and obtain, new employment. Their search may require them to move, or may lead them to a preferable job. Meanwhile, the employees remaining at the plant know what happened to the terminated employees, and fear that it will happen to them. The union's position in the plant may deteriorate to the point that effective organization and representation is no longer possible. As time passes, the benefits of unionization are lost and the spark to organize is extinguished. The deprivation to employees from the delay in bargaining and the diminution of union support is immeasurable. *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 38

(2nd Cir.1975). That loss, combined with the likelihood that the Board's ability to rectify the harm is diminishing with time, equals a sufficient demonstration of irreparable harm to the collective bargaining process. For the same reasons we conclude that there is no adequate remedy at law.

Electro-Voice has offered no countervailing demonstration of irreparable harm that would result from a grant of injunctive relief. In balancing the harms, the district court found in favor of the company because the absenteeism and poor performance that would result from reinstating the terminated employees would adversely impact productivity and employee morale at the Indiana plant. The court's conclusion does not comport with the facts. The critical piece of evidence pertaining to labor efficiency at the Indiana plant is a chart produced by Electro-Voice tracking labor efficiency at the plant from January of 1993 through November of 1994. The chart demonstrates that labor efficiency at the plant fell by 3.5 percent from July of 1994 to September of 1994. In October of 1994, the month that four discharged employees were reinstated, efficiency increased by 10.1 percent. In November of 1994, efficiency increased another 28.3 percent and surpassed employee efficiency in January of 1993. If anything, the addition of the terminated employees seems to correlate with increased employee efficiency. In the light of this evidence, we cannot find that the reinstatement of the remaining terminated employees will endanger the efficiency of the Indiana plant.

As for employee morale, we believe that the terminated employees' absence from the Indiana plant may place employee morale at greater risk. The persons, especially Pam Buford, most active and most successful in organizing the employees have been removed from the work place. Their absence deprives the employees of the leadership they once enjoyed.

The company also claims that injunctive relief will render it unable to discipline the reinstated workers. The company contends that if it attempts discipline, it will be subject to additional unfair labor practice charges and possibly even contempt sanctions. The company's argument has no merit. The company always has the legal right to discipline an employee in a nondiscriminatory fashion for improper conduct. Further, any company subject to a § 10(j) injunction is theoretically subjected to the risk of which Electro-Voice complains. The presence of such a risk cannot be the talisman of "harm" analysis. Otherwise § 10(j) injunctive relief would never issue.

D. The Public Interest.

Finally, we examine whether § 10(j) relief is in the "public interest." In Pioneer Press we defined the "public interest" analysis applicable in § 10(j) petitions as "harm to the public interest stemming from the injunction that is tolerable in light of the benefits achieved by the relief." *Pioneer Press*, 881 F.2d at 490 n. 3. In other words, when examining whether an injunction is in the public interest, a court must weigh the potential public benefits against the potential public costs. The public interest is furthered, in part, by ensuring that "an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge." *Miller, for and on Behalf of N.L.R.B. v. California Pacific Medical Center*, 19 F.3d 449 (9th Cir.1994). As we have noted above, there is evidence that the effectiveness of the Board's remedial powers will be circumscribed absent injunctive relief. There is no evidence that public harm would result from injunctive relief. Thus, injunctive relief is in the public interest.

The district court interpreted our holding in *P*I*E Nationwide, Inc.*, 878 F.2d at 210, to require proof that an

injunction would further a public interest beyond preventing the remedial purpose of the Act from being undermined. The district court misread our holding. In *P*I*E Nationwide, Inc.*, we stated that "'courts should consider such factors as the need for an injunction to prevent frustration of the basic remedial purpose of the act. . . .'" *Id.* at 210 (quoting *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 744 (7th Cir.1976)). We found no public interest at risk in *P*I*E Nationwide, Inc.* because the underlying claim before the Board amounted to no more than a "simple individual discharge case." *Id.* However, "had there been allegations that PIE created a situation that could chill employee claims against it, then section 10(j) relief might be appropriate." *Id.*

E. The Remedy: A Return to the Status Quo.

The district court refused to issue an interim bargaining order, in part, because the court concluded that the "status quo" to be preserved by such an order is the period prior to any union activity. According to the district court, a bargaining order would alter the appropriate status quo in this case because the union only received a card majority prior to the onslaught of Electro-Voice's alleged unfair labor practices. The district court relied on the Fifth Circuit's holding in *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185 (5th Cir.1975), *cert. denied*, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed.2d 385 (1976). In *Pilot Freight Carriers, Inc.*, the court considered a case in which a majority of employees signed union authorization cards after the employer had begun committing unfair labor practices. *Id.* at 1190-91. The court of appeals affirmed a lower court's refusal to issue a bargaining order based on the authorization cards on the ground that "the status quo ante was the period prior to any union activity when the [employees] were unrepresented. An

interim bargaining order would materially alter that status, creating by judicial fiat a relationship that never existed." *Id.* at 1194. In other words, the Fifth Circuit concluded that a federal court may not issue an interim bargaining order based upon a card majority because the union obtained the majority in temporal proximity to the unfair labor practices.

In Trading Port, Inc., the Second Circuit reached a different conclusion. The Second Circuit considered a case in which a majority of employees signed union authorization cards before the employer commenced its campaign of unfair practices, but rejected the union in an election held after the campaign. The court reversed the district court's conclusion that "it is not just and proper for a district court to order bargaining, even though the Board is free to find on the merits that the union's previous card majority coupled with subsequent unfair labor practices by the employer justify such an order." *Trading Port, Inc.*, 517 F.2d at 37. The court reasoned that the only way to effectuate employees' rights pending a determination by the Board is to re-establish matters as they existed prior to the employer's activities. Specifically, the court reasoned:

> Just as a cease and desist order without more is ineffective as final relief in a *Gissel* situation, it is, in certain cases, also insufficient as interim relief. If an employer faced with a union demand for recognition based on a card majority may engage in an extensive campaign of serious and pervasive unfair labor practices . . . , and is then merely enjoined from repeating those already successful violations until final Board action is taken, the Board's adjudicatory machinery may well be rendered totally ineffective. . . . Only if the district courts may issue interim bargaining orders can the union's viability be maintained to the degree necessary to

> make final Board adjudication in the form of an election or a bargaining order meaningful.
>
> * * * * * *
>
> [T]he status quo which deserves protection under § 10(j) is not the illegal status quo which has come into being as a result of the unfair labor practices being litigated. Instead, section 10(j) was intended as a means of preserving or restoring the status quo as it existed before the onset of unfair labor practices.

Id. at 37-38 (citations omitted).

At least two other circuits have adopted the Second Circuit's reasoning. *See Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23, 27-28 (1st Cir.1986); *Levine v. C & W Mining Co., Inc.*, 610 F.2d 432, 437 (6th Cir.1979); *cf. Pascarell v. Vibra Screw, Inc.*, 904 F.2d 874, 878 n. 5 (3rd Cir.1990) (adopting a position similar to the Second Circuit's). So do we. As the facts of this case make clear, alleged unfair labor practices can have an enormously destructive effect on organizational efforts. One month employees have an overwhelming card majority in favor of unionizing. The next month, having been confronted with threats of plant closing or termination, employees are afraid to attend a union meeting. Ordering an employer to cease his illegal activity, without more, will in some cases preserve the fallout of the illegal activity without preserving the Board's remedy. Absent a bargaining order, time works on the side of the employer-perpetrator to help him achieve his illegal purpose. Such a result is not contemplated by the Act.

Conclusion.

The district court relied on incorrect legal analysis and reached clearly erroneous factual findings. We have the same

record before us that was before the district court. The district court heard no testimony. Therefore, we find no need to remand this case for additional determinations. The Director presented a case sufficient to justify injunctive relief and an interim bargaining order. Electro-Voice should be enjoined from committing any unfair labor practices and required to reinstate the remaining employees terminated on July 7, 1994. Further, an interim bargaining order should issue requiring Electro-Voice to recognize, and bargain with, the union. The holding of the lower court to the contrary is

REVERSED AND REMANDED for further proceedings consistent with this opinion.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT WITH ORAL ARGUMENT

Date: April 26, 1996

Before: Honorable JESSE E. ESCHBACH, Circuit Judge
Honorable JOHN L. COFFEY, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

No. 95-2611

NATIONAL LABOR RELATIONS BOARD,
Petitioner-Appellant

v.

ELECTRO-VOICE, INCORPORATED,
Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Indiana, South Bend Division
No. 94-C 1037, Robert L. Miller, Judge

The judgment of the District Court is REVERSED, with costs, and the cause is REMANDED, in accordance with the decision of this court entered on this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SAUNDRIA BORDONE, Regional Director of the Twenty-fifth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

ELECTRO-VOICE, INC.,

Respondent-Appellee.

No. 95-2611

MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO DISMISS APPEAL AS MOOT AND TO VACATE THE DISTRICT COURT'S ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

Petitioners-Appellant, Saundria Bordone Regional Director for the Twenty-fifth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board ("the Board"), hereby notifies the Court that the Board has issued its Decision and Order in the unfair labor practice case underlying this matter and the Board, therefore, respectfully moves, pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, to dismiss the instant appeal as moot, and to vacate the district court's opinion. In support of its motion, the Board shows as follows:

1. On July 3, 1995, the Board filed a notice of appeal from an order of the United States District Court for the Northern District of Indiana. The district court had denied the Board's petition for interim injunctive relief, pursuant to § 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), pending the Board's final disposition of an unfair labor practice complaint.

2. Both parties filed briefs and the appeal was argued on January 11, 1996.

3. On March 29, 1996, the Board issued its decision in the underlying administrative proceeding, finding the violations alleged and imposing as a remedy, inter alia, a bargaining order. *Electro-Voice, Inc.*, Case 25-CA-23319, 320 NLRB No. 134 (copy attached).

4. Because the Board has now issued its decision, an interim injunction pending that decision can no longer be granted and the appeal seeking such relief is moot. See *Sears, Roebuck & Co. v. Carpet etc. Layers, Local 419*, 397 U.S. 655, 658-659, 90 S.Ct. 1299 (1970); *Barbour v. Central Cartage*, 583 F. 2d 335, 336-337 (7th Cir. 1978).

5. Since the appeal has been rendered moot by operation of law during the course of the appeal, it is appropriate to vacate the district court's opinion in order "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 41, 71 S.Ct. 104 (1950). See also *Duke Power Co. v. Greenwood Co.*, 299 U.S. 259, 267, 57 S.Ct. 202 (1936) ("it is the duty of the appellate court to set aside the decree below"); *Great Western Sugar Co. v. Nelson*, 442 U.S., 92, 94, 99 S.Ct. 2149 (1979) (per curiam) (because the fact of mootness is clear and because the law as laid down in *Duke Power* and *Munsingwear* is equally clear, judgment allowing

district court opinion to stand is vacated and the court of appeals is directed to vacate the district court's judgment and to remand the case for dismissal). *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ___ U.S. ___, 115 S.Ct. 386, 390-393 (1994) is not to the contrary. There, the Supreme Court held that vacatur was not appropriate for a case that settled while on appeal. The Court upheld, however, the continued viability of the *Munsingwear* principle that vacatur is appropriate for a party "who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance." 115 S.Ct. At 391. See also *Kitlutsisti v. Arco Alaska, Inc.*, 782 F. 2d 800, 801 (9th Cir. 1986) (vacatur appropriate where appeal from injunction, which prohibited drilling until EPA issued permit, became moot upon EPA's issuance of permit); *Miller v. Benson*, 68 F. 3d 163, 164-165 (7th Cir. 1995) (per curiam) (vacatur appropriate where controversy mooted by intervening legislation).

6. Inasmuch as the appeal is moot, it is appropriate for each party to bear its own costs.

7. On April 4, 1996, the undersigned informed Thomas J. Barnes, counsel for Electro-Voice, that the Board would filed this motion.

WHEREFORE, the Board respectfully requests the Court to dismiss this appeal and vacate the district court's opinion below.

Respectfully submitted,

/s/ Ellen A. Farrell

Ellen A. Farrell,
Assistant General Counsel
Corinna L. Metcalf,
Deputy Assistant General Counsel

Karen M. Thornton
Attorney

NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570
Telephone: (202) 273-3807
Attorneys for Petitioner-Appellant

Dated at Washington, D.C.
This 5th day of April, 1996

[certificate of service omitted in printing]

United States District Court
Northern District of Indiana

UNITED STATES OF AMERICA, Saundria Bordone, Regiional Director of the Twenty-fifth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

v.

ELECTRO-VOICE, INC.,

No. 3:94-CV-1037RM

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petitioner's motion for preliminary injunction under Section 10(j) of the NLRB is denied; the petitioner shall take nothing and the above action is terminated.

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Appellate Procedure on:

May 5, 1995

Geraldine J. Crockett
By Shirley Paulson
Deputy Clerk

United States District Court
Northern District of Indiana

UNITED STATES OF AMERICA, Saundria Bordone, Regiional Director of the Twenty-fifth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner

vs.

ELECTRO-VOICE, INC.,

Respondent

Cause No. 3:94-CV-1037RM

MEMORANDUM AND ORDER

This cause is before the court on the petitioner's motion for preliminary injunction under Section 10(j) of the NLRA, as amended, respondent's motion for oral argument on petitioner's motion for 10(j) injunction, and petitioner's motion to strike Section E-3 entitled "Internal Board Guidelines" located on pages 52-55 of respondent's brief in opposition to petition for 10(j) injunction. For the reasons that follow, the court denies all of the motions presently before it.

I.

The United States, on behalf of the National Labor Relations Board, commenced this action on December 20 by filing a petition for temporary injunctive relief against Electro-Voice, Inc. ("Electro-Voice") pursuant to Section

10(j) of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. Section 160(j). The petition is based upon a complaint of unfair labor practice against Electro-Voice in NLRB Case 25-CA-23319, pursuant to Section 10(b) of the Act. On July 8, 1994, the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (the "Union") filed an unfair labor practice charge against Electro-Voice. The Union filed an amended charge on July 19 and a second amended charge on August 30. On October 18, the Board's General Counsel issued a complaint against Electro-Voice alleging that Electro- Voice engaged in unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the Act, 9 U.S.C. Section 158(a)(1), (3) and (5). On December 19- 22 and January 17-19, an Administrative Law Judge held a hearing on the complaint.

Electro-Voice is a wholly-owned subsidiary of Mark IV Audios, Inc. which has manufacturing plants in Mishawaka, Indiana as well as in Buchanan, Michigan and Tennessee. The employees at the Michigan and Tennessee plants have been unionized for years. The Mishawaka plant manufactures audio speakers. The Mishawaka plant was staffed by the plant manager Dennis Northam, the general foreman Paul Grasso, the office manager Maggie Michael and approximately 30 production and maintenance employees. Mr. Northam reported to the Board of Manufacturing. Minnie Warren, the Human Resource Manager for the Buchanan plant, has oversight responsibility for the human resource function at the Mishawaka plant. She reports directly to the Vice President of Human Resources for Mark IV Audio, Ron Graham. Ms. Warren and Mr. Graham work out of the Buchanan plant, which is approximately 25 miles from the Mishawaka plant.

In late 1991 or early 1992, a quality management program, "CARE," was initiated at the Mishawaka plant.

CARE's purpose was to maximize quality and productivity. That purpose was to be accomplished, in part, by addressing employee concerns and work environment issues such as employee morale, equipment, tools, maintenance and break rooms. Regular solicitation of employee concerns is essential to the success of CARE. Tony Sawyer, Director of Quality for Mark IV Audio, is responsible for the CARE program at all Mark IV facilities, including the Mishawaka plant. Dennis Northam was responsible for the implementation of CARE at Mishawaka on a daily basis and reported to Mr. Sawyer regarding the status of CARE at the Mishawaka plant. Mr. Northam abandoned CARE and lied to his superiors about its status at the Mishawaka plant.

In late 1993, the Mishawaka plant began to experience a decrease in labor efficiency. Jay Melton and Mr. Sawyer expressed their concerns to Mr. Northam, who attributed the decrease to high labor turnover caused by low wages. Wages were increased, but the decrease in efficiencies persisted, and by June 1994, the labor efficiency had declined approximately 20 percent.

In early 1994, Pamela Buford, a Mishawaka plant production employee, contacted Minnie Warren to complain about Mr. Northam and to report that employees wanted to speak with Ms. Warren about problems in the plant. Ms. Warren said that she would try to visit the plant as soon as possible, but that she was understaffed. Additional complaints were made, including a complaint of employee drug use at the Mishawaka plant. Because of the complaints, Mr. Graham directed Ms. Warren to visit the Mishawaka plant to interview each employee personally. Mr. Graham believed that an interview of every employee was necessary because he was concerned that Mr. Northam would retaliate if Mr. Northam learned who the sources were.

In June 1994, Ms. Buford suggested unionization to her co-workers, and she contacted Dana Fair, the president of the union at the Buchanan plant. Ms. Buford contacted Al Warzecha, a Union representative who conducted a meeting of Elecro-Voice employees on June 17. Sixteen employees attended the June 17 meeting. A second meeting was held on June 22. Although Mr. Warzecha suggested that Electro-Voice would threaten to close the Mishawaka plant in the face of a union organizing campaign, 21 of the 28 production employee's attended and executed authorization cards, authorizing the Union to act as their collective- bargaining representative. Another employee secretly executed a union card on July 7. At the June 22 meeting, 11 employees offered to be members of an in- plant union organizing committee.

On June 22, Mr. Graham told Ms. Warren about rumors of union activity at the Mishawaka plant. Ms. Warren arrived at the Mishawaka plant that same day and held an employee meeting at which she advised the employees about the complaints she had received and informed them that she would meet with each of them individually to discuss their complaints regarding work. According to Ms. Warren and Ms. Weaver, Ms. Warren discussed drug use and testing during her meeting. Ms. Warren conducted individual interviews on June 23 and 24. She questioned employees about how things were going, and asked them to say what they had on their minds. According to Ms. Warren, Tracy Dermody, Tracie Bentley and Sherry Mize, Ms. Warren did not ask the employees anything about a union. The employees mostly complained about Mr. Northam, but also complained about chronic absenteeism, the lack of fans, the lack of hot water in the rest rooms, and problems with the production tooling. Absenteeism occurred daily and disrupted production on the line and frustrated the workers. Ms. Warren learned

that two production employees, Frank and Don Simon, were threatening to quit because of problems in the plant.

With the information obtained by Ms. Warren, Electro-Voice decided to terminate Mr. Northam's employment on June 27. Mr. Melton, who replaced Mr. Northam, held an employee meeting at which he informed the employees of Mr. Northam's termination and said Ms. Warren's interviews would continue. Mr. Melton solicited employee complaints and said that Ms. Warren was seriously considering employee complaints and concerns. Mr. Melton discussed the need to produce quality products at a competitive price and said that CARE would be re-emphasized, with Mr. Sawyer to hold another meeting regarding CARE. According to some employees, Mr. Melton said that he intended to review Electro-Voice's attendance policy and make other improvements such as providing fans and a raise to employees. According to some witnesses,[1] Mr. Melton also discussed the union organizing activity and threatened to close the plant and move work to other plants if the employees voted for a union. According to Jason Havens, Mr. Melton said that " [t]here will never be a union in this shop." According to Frank Simon, Mr. Melton did not know of any union organizing activity on June 27, said nothing about any union activity, and did not threaten to close the plant. After the meeting, no employees expressed any concerns about the threatened plant closings.

On June 28, Frank Simon told Mr. Melton of rumors of union organizing activity, but did not identify the employees involved and Mr. Melton did not ask for names. According to Mr. Melton, that was the first he heard of the union activity.

---

[1] Kendall, Mize, Havens, Barrows, and Bentley.

On June 29, Mr. Melton held a second employee meeting, announced previously as the CARE meeting at which Mr. Sawyer would speak. Tracy Dermody, Tracie Bentley, and Sherry Mize testified that Mr. Melton solicited employee complaints and promised to improve the problems. Mr. Melton discussed the rumors of union organizing at the meeting and said there was no need for a union. He encouraged employees not to relinquish their right to independent views, but said that if they wanted a union that was their decision to make. According to Mr. Melton, Frank Simon, and Ms. Nash, Mr. Melton did not threaten plant closings, but spoke of the plant's bright future. Mr. Sawyer spoke of the plant's bright future as well. After the meeting, the employees did not express concerns among themselves about threatened plant closures. Ms. Buford's July 14 affidavit does not mention any threats of plant closure.

Ms. Warren's employee interviews continued on June 28 and 29. The only evidence of any questioning regarding union involvement was Ms. Warren's question to Ms. Buford as to whether she was aware of the union organizing campaign. Ms. Buford denied any knowledge about a union. Ms. Warren did not question Ms. Buford whether she was involved in the union and did not question her about her feelings toward a union.

Upon completing her interviews, Ms. Warren met with Mr. Graham and reported a serious absenteeism problem and advised that immediate action should be taken. Mr. Graham said he wanted to meet with Ms. Warren and Mr. Melton at the plant after July 4 to discuss the attendance problems. On June 29 or 30, a meeting was scheduled for July 7, because Mr. Graham could not meet until that day.

On June 30, Mr. Grasso terminated Brian Szajko's employment for absenteeism. Mr. Szajko had been absent

from work two days out of his seven days of employment. Mr. Szajko had executed a union authorization card, but Mr. Grasso did not know that when he terminated Mr. Szajko.[2]

On July 5, Mr. Grasso terminated David Shaffer. Mr. Shaffer had been arguing with a co-worker on July 3 and 5, and Mr. Grasso had observed Mr. Shaffer wandering around the plant on numerous occasions rather than working. Mr. Grasso had reports that Mr. Shaffer had broken nearly a dozen horns, at a cost of $1,100 each, and laughed about it. Mr. Shaffer had been employed for eight weeks and had missed work twice and left work early twice. Mr. Grasso was unaware that Mr. Shaffer had signed a union authorization card and was a member of the union organizing committee until after Mr. Shaffer's termination.

On July 5, the union organizing committee held a meeting; between 12 and 15 employees attended. All but one of those in attendance voted to proceed with the organizing efforts. Other employees, unable to attend the July 5 meeting, expressed their interest in proceeding with a union.

On July 7, Union Representative Al Warzecha delivered a letter to Mr. Graham seeking recognition of the Union as the collective-bargaining agent for a unit of production employees. Mr. Warzecha also filed a petition for an election with the Board. Mr. Graham was not surprised by the letter because he was aware of how Mr. Northam had treated employees, was aware of past organizing attempts, and knew that a goal of the president of the Buchanan local was to organize the Mishawaka plant.

---

[2] The Director does not allege that Mr. Szjako was terminated because of his union organizing activities

Despite the union request for recognition and because of the absenteeism and efficiency problems, Mr. Graham decided to review the attendance and work performance records of all production and maintenance employees. Ms. Warren had given Mr. Graham a list of employees with their respective attendance points. Since at least 1987, Electro-Voice has had an attendance policy providing for progressive discipline for absences. Under the attendance policy, an employee accumulates points for absences, regardless of the reason for the absence. Points are accumulated over a 12-month period. The third point results in a verbal warning, the fifth point in a written warning, the seventh point in a one-day suspension, the tenth point in a five-day suspension, and the thirteenth point results in the employee's discharge.[3] The attendance policy reserves to Electro-Voice the right to discharge an employee who, because of cumulative lost work time, is considered undependable an employee. Electro-Voice's office manager, Margaret Michael, testified that she explained the reservation provision to new hires, but the employee-witnesses testified to the contrary. According to the employee-witnesses, new hires merely were instructed to read the attendance policy. The Director does not dispute that the attendance policy contained the reservation provision.

Mr. Graham concluded that the plant had an absenteeism problem, based on the information received from Ms. Warren that the most frequent employee complaint was with the attendance policy. On or about July 7, Mr. Graham reviewed the employee attendance information provided by Ms. Warren

---

[3] On June 30, Ms. Warren stated an intent to modify the attendance policy such that an employee could be late to work up to five minutes and not receive an attendance point and that a long-term medical problem requiring several doctor appointments would constitute one attendance point.

and decided that any employee who had more than 7 points or who had been employed less than 6 months and had a "good number of points" would be terminated. In accordance with that decision, Mr. Graham terminated December Barrows, Tracie Bentley, Pam Buford, Tracy Dermody, Jason Havens, Scott Kendall, Michelle Kincses, Sherry Mize, and David Shaffer, all of whom had been with Electro-Voice for nine months or less and had, in Mr. Graham's opinion, serious attendance problems.[4] Additionally, Mr. Havens and Mr. Kendall were viewed as having serious work performance problems. Each of the terminated employees had attended union organizational meetings on June 17, 22 and July 5, and had executed a union authorization card. Mr. Melton and Ms. Warren agreed with Mr. Graham's termination decisions.

The stated purpose for the terminations was to inform the employees that Electro-Voice was serious about its attendance policy, but Mr. Graham could not explain how he determined what constituted a "good number of points." He did not isolate the terminated employees as the cause of the problem in efficiencies. Another employee and union supporter, Ms. Lello, had accumulated more than seven attendance points but was not terminated. Mr. Graham stated that an exception was

---

[4] The discharged employees had the following hire dates and attendance points:

	Hire Date	Points
December Barrows	11-01-93	12.0
Tracie Bentley	03-15-94	7.5
Pamela Buford	11-10-93	10.0
Tracy Dermody	12-13-93	9.5
Jason Havens	05-24-94	3.0
Scott Kendall	02-16-94	8.5
Michelle Kincses	05-04-94	3.0
Sherri Mize	05-31-94	2.0
David Shaffer	05-11-94	4.0

made for Ms. Lello due to the mitigating circumstances of her absences; she was in the middle of a divorce.

Employee attendance and efficiencies improved greatly after the terminations. Electro-Voice replaced the terminated employees with temporary employees. Electro-Voice reinstated four of the discharged employees in September or October; those employees have maintained satisfactory attendance records since their reinstatement.

On July 9, the employees held a union meeting attended by the dischargees and at least two other Electro-Voice employees. The union organizing committee has remained intact, is confident that the union has support within the Mishawaka plant, and is "in the process of having a meeting." Al Warzecha testified that several employees have told him that they are afraid to meet with him for fear of losing their jobs. Linda Vore's testimony supported Mr. Warzecha's. Sandy Weaver testified that employees other than herself feared for their jobs.[5]

Mr. Melton acted as plant manager until late July 1994, when Paul Grasso assumed the position. As part of the process initiated in late 1993 and in conjunction with CARE, several repairs were made to the plant under either Mr. Melton or Mr. Grasso's direction, including new fans, new tools, and repair to a broken sewer line. Kathy Nash, an employee, painted and wallpapered the women's rest room.

II.

The Director contends that Electro-Voice engaged in a campaign to quash union organizational activity by soliciting employee grievances, questioning employees about the union,

---

[5] Contrary to the Director's claim, Ms. Weaver did not testify that the fear was "because of union activity."

interviewing individual employees, impliedly promising improvements, subsequently correcting some grievances, threatening plant closure and work transfer, and terminating nine employees, all union supporters. The Director contends that without the injunctive relief it seeks, a substantial probability exists that the Board's final order will be ineffective in remedying Electro-Voice's unfair labor practices due to the passage of time and waning employee support for the union.

Section 10(j) of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. Section 160(j), empowers a federal district court to issue a preliminary injunction before the National Labor Relations Board has adjudicated an unfair labor practice complaint. *See NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 891 (7th Cir. 1990). A preliminary injunction is an "extraordinary" remedy that should be used sparingly. *McLeod v. General Elec. Co.*, 366 F.2d 847, 849 (2nd Cir. 1966), *vacated on other grounds*, 385 U.S. 533 (1967). Section 10(j) relief is available where the Board is unable "to correct unfair labor practices until after some substantial injury" results and where the violations may accomplish their unlawful objective before the Board has adjudicated the complaint. *Szabo v. P*I*E Nationwide, Inc.*, 878 F.2d 207, 210 (7th Cir. 1989).

The Director erroneously relies on *Kinney v. International U. of Op. Eng'rs., Local 150, AFL-CIO*, 994 F.2d 1271, 1278 (7th Cir. 1993), and *Squillacote v. Graphic Arts Int'l Union, AFL-CIO*, 540 F.2d 853, 860 (7th Cir. 1976), for the propositions that the court's function is limited to determining whether contested factual issues ultimately could be resolved in the Director's favor and that the court must give the Director the benefit of the doubt. The Director confuses the analysis and deference due under a Section 10(j) petition with

that due under a Section 10(l) petition. *Kinney v. Pioneer Press*, 881 F.2d 485, 493 (7th Cir. 1989), overruled prior case law that equated Section 10(j) and Section 10(l) and that required the court to find "reasonable cause" before issuing a Section 10(j) injunction. Under *Pioneer Press*, "reasonable cause" that a violation has occurred is not a sufficient basis upon which the court may issue a preliminary injunction. 881 F.2d at 493-94. The deference that the Director contends is due applies only to Section 10(l) petitions and not to Section 10(j) petitions.

In this Section 10(j) proceeding, this court must determine solely whether a preliminary injunction pursuant to Section 10(j) is "just and proper." *Local 150*, 994 F.2d at 1276-78; *Pioneer Press*, 881 F.2d at 890. In *Local 150*, 994 F.2d at 1277, the Seventh Circuit rejected the more lenient and "sliding scale" approach advocated by the Board.[6] To determine whether an injunction would be "just and proper," this court "must apply the traditional test in equity." *Local 150*, 994 F.2d at 1277-78; *P*I*E Nationwide*, 894 F.2d at 891. Under the traditional test, before an injunction may issue the Director must show: (1) a reasonable likelihood of success on the merits; (2) an inadequacy of a remedy at law or threat of irreparable harm if an injunction is not issued; (3) the balance of the threatened harms if an injunction is issued against the threatened harms if an injunction is not issued; and (4) that the preliminary injunction would serve the public interest. *Local 150*, 994 F.2d at 1279; *Walgreen Co. v. Sara Creek Property Co.*, B.V., 966 F.2d 273, 275 (7th Cir. 1992); *Banks v. National Collegiate Athletic Ass'n*, 746 F.Supp. 850, 855 (N.D. Ind. 1990). The Director must establish that the preliminary injunction is needed to avoid

---

[6] This approach requires the Director to show a likelihood of success on the merits and a balancing of the equities. *Local 150*, 994 F.2d at 1277.

"public harm" because Section 10(j) "relief is not available to vindicate . . . private rights." *Szabo*, 878 F.2d at 210.

A. *Likelihood of Success on the Merits*

The Director must show a "better than negligible" chance of prevailing. *Kinney v. International U. of Op. Eng'rs., Local 150, AFL-CIO*, 994 F.2d 1271, 1278 (7th Cir. 1993); *Kinney v. Pioneer Press*, 881 F.2d 485, 491 (7th Cir. 1989) ("the district judge must consider the strength of the Director's case"). The greater the likelihood of success on the merits, the less of a showing is required as to the balancing of the equities. *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387-88 (7th Cir. 1984); *see also Pye v. Syllivan Bros. Printers, Inc.*, 38 F.3d 58, 67 (1st Cir. 1994). In determining whether the Director has met this burden, the court must remember that it has no jurisdiction to decide the ultimate merits of the unfair labor practice case, *see Squillacote v. Graphic Arts Int'l Union*, 540 F.2d 853 (7th Cir. 1976), and that the Board's decision on the merits ultimately is due substantial deference. *See Miller v. California Pacific Medical Center*, 19 F.3d 449, 460 (9th Cir. 1994) (en banc); *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1265 (7th Cir. 1987).

If the evidence of unfair labor practices is "equivocal" or "unclear," the court should deny the petition for Section 10(j) relief. *See Johnston v. Stevens & Co.*, 57 LRRM (BNA) 2322, 2326 (W.D.S.C. 1964), *enf'd*, 341 F.2d 891 (4th Cir. 1965); *Fleishut v. Avondale Indus., Inc.*, Civ. A. No. 94-3500, 1995 WL 27464, at **4-5 (E.D. La. Jan 23, 1995); *but see Zipp v. Caterpillar, Inc.*, 858 F.Supp. 794, 798-99 (C.D. Ill. 1994) (finding the Board established a reasonable likelihood of success on the merits where the evidence was equivocal). In *Johnston*, 14 of the 50 employees who notified their employer that they had joined the union were

discharged. 57 LRRM at 2324. Upon considering the charges of unfair labor practices as well as the employer's explanations, the court concluded that Section 10(j) relief was not appropriate because the Board might either find that some of the discharges constituted unfair labor practices or accept the employer's explanation for the discharges. *Johnston*, 57 LRRM at 2326. Similarly, in *Fleishut*, 1995 WL 27464, at **4-5, the court found that the Board showed no likelihood of success on the merits where the employer posited legitimate grounds for the allegedly unfair labor practices and presented affidavits as to the lack of knowledge of union activity. As in *Johnston* and *Fleishut*, this case turns on credibility determinations, and where the evidence regarding the alleged unfair labor practices is equivocal or unclear, the court should decline to issue a Section 10(j) injunction. The court will consider each of the Director's claims of unfair labor practices with these standards in mind.

First, the Director contends that Electro-Voice violated the Act by soliciting employee grievances and promising to remedy such grievances in order to deter the employees' union organizing efforts. The Director argues that Electro-Voice solicited employee grievances and impliedly promised to remedy such grievances by: (1) Ms. Warren's individual meetings with employees soliciting their grievances with express or implied promises of corrective action; (2) Mr. Melton's solicitation of grievances and promises at group meetings on June 27 and 29; and (3) Mr. Melton's solicitation and promises during individual employee interviews.

An employer's solicitation of employee grievances and promise of actions to correct such grievances violates Section 8(a)(1) of the Act. 29 U.S.C. Section 158(a)(1) (West 1985) ("It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise

of the rights guaranteed [by the Act]"). Solicitation of employee grievances during a union organizing campaign does not violate the Act if such solicitations are consistent with the employer's practices and policy. *Ichikoh Mfg., Inc.*, 312 NLRB 1022, 1024 (1993), *enf'd*, 41 F.3d 1507 (6th Cir. 1994); *Bell Halter, Inc.*, 276 NLRB 1208, 1214-16 (1985); *Williams Litho Service, Inc.*, 260 NLRB 773, 792-93 (1982). In *Ichikoh Mfg.*, 312 NLRB at 1024, the employer's human resources manager solicited employee concerns and said that the employer would be more lenient than the Union, would correct past favoritism and inconsistencies in employee treatment, would work on a new employee handbook in response to certain complaints, and was looking for a new less-expensive medical insurance policy. The Board found that in the absence of any evidence of a past practice and policy of soliciting employee grievances, the statements implicitly promised to remedy employee grievances. *Ichikoh Mfg.*, 312 NLRB at 1024; *see also Vincent M. Ippolito, Inc.*, 313 NLRB 715, 724 (1994) (soliciting employees and promising better working conditions because of employees' Union membership or activities violates Section 8(a)(1)).

Regular solicitation of employee concerns is essential to the success of Electro-Voice's CARE Program, the program initiated at the Mishawaka plant in late 1991 or early 1992 to maximize productivity and quality. Unbeknownst to Tony Sawyer, Director of Quality for Mark IV Audio and responsible for the CARE program at all Mark IV facilities (including the Mishawaka plant), Dennis Northam had secretly abandoned the CARE Program and lied about its status at the Mishawaka plant. The record would support a finding that Electro-Voice had a past and current policy, if not practice, of soliciting employee grievances, and hence that Electro-Voice's mere solicitation of employee grievances and implied promises of corrective action during a union

organizing campaign was not violative of the Act. Similarly, the record does not strongly establish that the changes provided by Electro-Voice--minor repairs and maintenance as well as minor change in the attendance policy -- were either significant or motivated by the union organizing campaign. Based on this record, the court cannot find a probability that this conduct will be found to have been violations of Section 8(a)(1). *See, e.g.*, *The Broadway*, 267 NLRB 385, 406- 407 (1983); *Williams Litho Service*, 260 NLRB at 774.

Second, the Director contends that Electro-Voice violated the Act by questioning Michelle Kincses about her own and others' union activities and by questioning Ms. Buford about others' union activities. Whether questioning of employee's "reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act," 29 U.S.C. Section 158(a)(1) (West 1985), turns on the totality of the circumstances of the alleged questioning, including the background, the nature of the questioning, the identity of the questioner, and the method and place of questioning. *Sunnyvale Medical Clinic, Inc.*, 277 NLRB 1217, 1218 (1985); *Rossmore House*, 269 NLRB 1176, 1177-78 (1984), *aff'd sub nom. Hotel Employees and Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (finding no violation where employee openly stated his union ties to employer in telegram, where the questioning concerned the contents of telegram employee sent to employer and reasons why employee wanted union and whether union charged a fee); *see also Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980) (court should consider words and context of questioning). In *Sunnyvale Medical Clinic*, 277 NLRB 1217, at 1222, the Board found no violation where there was no history of employer hostility or discrimination against the union, the nature of the information sought was relatively harmless — the employee was asked whether it was something

personal —, the informal questioning was on a friendly basis, and the employee not only answered the questions truthfully, but also asked questions of the employer's personnel director regarding the union.

For purposes of this petition, the court assumes[7] that the Board will find that Ms. Warren questioned Ms. Kincses about the effect she thought the union would have on plant operations and whether she thought a majority of employees would vote for the union. Such questioning, like that in *Rossmore House*, 269 NLRB at 1177-78, is not likely violative of the Act. Likewise, Ms. Warren's questioning of Ms. Buford whether she was aware of the union organizing campaign, is a relatively harmless question and therefore, it does not appear likely that the Board will find that it violated the Act. *See Sunnyvale Medical Clinic*, 277 NLRB at 1222.

Mr. Melton's alleged questioning of Ms. Kincses as to whether she had signed a "blue card"[8] and whether she knew of anyone else who had signed one is more troubling. The alleged questioning was put by a member of upper-level management in an individual employee interview. Under such circumstances, the questioning may have "reasonably tend [ed] to restrain, coerce, or interfere with rights guaranteed by the Act." On the other hand, the questioning was made in a context with no history of employer hostility or discrimination against the union. The Board may find that Mr. Melton's alleged questioning violated the Act.

---

[7] The Director provides no citation to the record to support her contention that Ms. Warren questioned Ms. Kincses. The Director also contends that Ms. Kincses allegedly answered that she thought the plant would become more efficient, that the employees would be better paid with a union, and that the majority of employees would vote for a union.

[8] The union authorization cards were on blue paper

Third, the Director contends that Electro-Voice violated the Act by creating the impression that employee union activity was under surveillance. The record does not appear to be sufficient to support a finding that Electro-Voice created such an impression. If an employer creates an impression among employees that their union activity is under surveillance, the employer violates Section 8(a)(1) of the Act. 29 U.S.C. Section 158(a)(1) (West 1985); *see also United Charter Serv., Inc.*, 306 NLRB 150, 150-51(1992); *7-Eleven Food Store*, 257 NLRB 108, 116 (1981) (questioning as to who instigated the union organizing activity). In *United Charter Serv.*, 306 NLRB at 150-151, the NLRB found that statements made by a manager of the employer would "reasonably cause employees to believe that their protected concerted activities were under surveillance." The manager not only revealed that he knew about the employees' organizational meetings, but also gave details about the extent of the activities and particular topics discussed at the organizational meetings. *United Charter Serv.*, 306 NLRB at 150-151.

The Director relies on Ms. Dermody's testimony that Mr. Grasso implied that union organizing meetings were under surveillance.[9] Taking the testimony to be true, Mr. Grasso neither inquired of the union instigators nor gave any details as to the extent of union activities or particular topics covered at any union organizing meetings. Mr. Grasso's sole comment to Ms. Dermody could not have reasonably caused Ms.

---

[9] Ms. Dermody testified that after her individual interview with Mr. Melton, she inquired of Mr. Grasso as to the interest in employee complaints. According to Ms. Dermody, Mr. Grasso answered "Well, it's not what you think. Minnie (Warren) was down before your meeting." Ms. Dermody responded, "What meeting?" Mr. Grasso's answer, acording to Ms. Dermody, was "I'm not stupid."

Dermody or other employees to believe that their union organizing activities were under surveillance. As to Ms. Warren's presence at the Ramada Inn after the June 22 union meeting, one isolated observation of employees engaging in protected activity does not amount to unlawful surveillance in violation of the Act. *Hoyt Water Heater Co.*, 282 NLRB 1348, 1357 n.1 (1987). Therefore, it is unlikely that the Board would find that Mr. Grasso's comment constitutes a Section 8(a)(1) violation.

Fourth, the Director contends that Electro-Voice violated the Act by threatening plant closures and work transfers intended to daunt employee organizing efforts. To prevail on a charge of unlawful threats of plant closings in violation of Section 8(a)(1) of the Act, the Director must prove by a preponderance of the evidence that the company made such statements and that the statements were threatening in contrast to statements regarding the need or propriety of a union. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 690 (7th Cir. 1982), *supplemented by*, 281 NLRB 1157 (1986); *Kawasaki Motors Mfg. Corp.*, 280 NLRB 491, 492 (1986), *aff'd sub nom. Int'l Union, United Auto, Aerospace and Agr. Implement Workers of America v. NLRB*, 834 F.2d 816 (9th Cir. 1987) (employer's statement that the "one thing we do not need now or at anytime . . . is the [union]" not a violation); *see also Wiljef Transp., Inc. v. NLRB*, 946 F.2d 1308, 1310 (7th Cir. 1991). Threats of plant closures and discharges are "hallmark violations" of employee rights under the Act. *A.P.R.A. Fuel Oil*, 309 NLRB 480, 481 (1992), *enf'd*, 28 F.3d 103 (2nd Cir. 1994); *Foster Elec.*, 308 NLRB 1253 (1992). Threats of plant closures and other types of job loss are more likely than other types of unfair labor practices to negatively impact election conditions for an extended time period. *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), *enf'd granted*, 47 F.3d 1141 (3d Cir. 1995); *Koons Ford of*

Annapolis, 282 NLRB 506, 508 (1986), *enf'd*, 833 F.2d 310 (4th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988); *Salvation Army Residence*, 293 NLRB 944, 988 (1989).

Whether Mr. Melton threatened plant closures and work transfers is a credibility question. The Director relies on the testimony of December Barrows, Jason Havens, Scott Kendall, Michelle Kincses, and Sherry Mize to support the allegation that Electro-Voice threatened to close the plant. Significantly, Electro-Voice discharged all of these witness-employees. According to Ms. Buford, during her individual interview with Mr. Melton and Ms. Warren on July 6, Mr. Melton assured her that he was not certain of the extent of Ms. Buford's union activity but that other Electro-Voice plants would be able to take on the work from the Mishawaka plant. Ms. Kincses and Ms. Dermody also testified that Mr. Melton made such threats during their individual interviews. Ms. Dermody testified that Mr. Melton said that a union could not protect jobs and obtain higher wages for the employees. She also testified that Mr. Melton told her that if she had signed a blue card, she could revoke it.[10]

On the other hand, Mr. Melton, Ms. Warren and other employees testified that Mr. Melton did not threaten plant closures and work transfers. Of significance is that the employees did not talk among themselves about threatened plant closings after Mr. Melton's first meeting, Ms. Buford did not mention threatened closings or employee fear in her affidavit, and the initial unfair labor practice charge did not allege threats of plant closings. Moreover, the evidence shows that Mr. Melton spoke of the plant's bright future during his

---

[10] Although the Director claims that Mr. Melton did not deny threatening Ms. Kincses and Ms. Dermody at the NLRB hearing, the Director cites nothing in the record to support her claim.

meetings and spoke from prepared note cards that contain nothing about plant closings. Those note cards are probative of what Mr. Melton actually said during his meetings. *Auto Workers Local 148 (McDonnell-Douglas)*, 296 NLRB 970, 979 n.23 (1989). On the basis of the record, and where the determination rests on credibility alone, the court cannot find that it is more likely than not that Electro-Voice will be found to have threatened plant closures and work transfers.

Finally, the Director contends that Electro-Voice discharged its nine employees because of their union organizational activity in violation of Section 8(a)(3) of the Act. The Director also contends that Electro-Voice has not shown that, but for the employee organizational activity, Mr. Graham would have modified the attendance policy to allow the discharge of nine employees.

An employer's discharge of an employee in an effort to discourage union membership violates Section 8(a)(3) of the Act. 29 U.S.C. Section 158(a)(3) (West 1985) ("It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."). The employer's motivations in discharging an employee are critical to the determination whether the employer violated Section 8(a)(3). *See NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 406 (7th Cir. 1992); *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981). *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), and *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983), established an analysis for determining whether a discharge violates Section 8(a)(3) of the Act where the employer may have had dual motives or where the reason

stated for discharge was pretextual.[11] *See also Limestone Apparel Corp.*, 255 NLRB 722 (1981) (where employer's proffered reason for discharge is pretextual, discharge violates Section 8(a)(3)), *enf'd*, 705 F.2d 799 (6th Cir. 1982). Under the *Wright Line* test, applicable to both Section 8(a)(1) and Section 8(a)(3) violations, *see Adair Standish Corp.*, 290 NLRB 317 (1988), the Director bears the burden of establishing by a preponderance of the evidence that the employer's decision was motivated by a desire to frustrate the employee's exercise of protected activity. *Transportation Mgmt.*, 462 U.S. at 402-03; *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 716 (7th Cir. 1992); *Wright Line*, 662 F.2d 904. If the Director establishes such motivation, the employer bears the burden of proving by a preponderance of the evidence that it would have discharged the employee regardless of the protected conduct. *Transportation Mgmt.*, 462 U.S. at 393; *Chicago Tribune*, 962 F.2d at 718; *Wright Line*, 251 NLRB 1083.

Both direct and circumstantial evidence may be considered in determining the employer's motivation for the alleged discriminatory discharge, *Chicago Tribune*, 962 F.2d at 719; *NLRB v. Industrial Erectors, Inc.*, 712 F.2d 1131, 1137 (7th Cir. 1993); *Justak Bros.*, 664 F.2d at 1077, as may evidence of employer hostility toward the union, knowledge of the discharged employee's union activity, timing of the action, and implausible or shifting explanations for the allegedly unlawful action. *Chicago Tribune*, 962 F.2d at 719; *Industrial Erectors, Inc.*, 712 F.2d at 1137. Evidence of equal treatment

---

[11] In a "dual motive" case, the employer's action is partly based on lawful grounds and partly based on unlawful grounds, whereas, in a "pretext" case the stated lawful grounds either did not exist or were not relied upon by the employer when taking action. *See Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 719 (7th Cir. 1992).

of employees who did not engage in union activity but engaged in conduct similar to that for which the dischargee was allegedly terminated is important. *Chicago Tribune*, 962 F.2d at 719; *NLRB v. Town & Country LP Gas Service Co.*, 687 F.2d 187, 192 (7th Cir. 1982).

The court cannot find a reasonable probability that the Board will find that the Director has established by a preponderance of the evidence that Electro-Voice's discharges were motivated by unlawful purpose. The Director argues that Electro-Voice has never terminated any employee under that provision of the attendance policy allowing the discharge of an employee before that employee has accumulated 13 points, but the record shows that Electro- Voice has terminated employees with less than 13 points, although the reason for the termination is less clear.

Assuming that Electro-Voice departed from its attendance policy, the court cannot find a reasonable probability that the Board will draw an inference of unlawful motivation from this record. An employer may lawfully discharge an employee, even a union activist, for attendance problems regardless of whether the discharge complies with the employer's attendance policy, as long as the discharge was not based on the employee's union activity. *See Central Freight Lines, Inc.*, 255 NLRB 509, 510 (1981) (absenteeism policy ignored in the case and in all cases), *enf'd*, 666 F.2d 238 (5th Cir. 1982); *Western Care, Inc.*, 250 NLRB 509, 516 (1980); *Ostby & Barton Co.*, 202 NLRB 199, 201 (1973). It does not appear likely that the Board will find that Electro-Voice fostered hostility toward the union; to the contrary, the other plants are unionized and the parties agree that the relations have been amicable.

That Electro-Voice had general knowledge of union organizing activity is insufficient to support an inference of

unlawful motivation in the discharges. *Metro Center, Inc.*, 267 NLRB 288, 298-299 (1983), *enf'd*, 738 F.2d 423 (3rd Cir. 1984); *see also Guille Steel Products Co.*, 303 NLRB 537, 543 (1991) (same); *Future Ambulette*, 293 NLRB 884, 892 (1989), *enf'd as modified*, 903 F.2d 140 (2nd Cir. 1990), *supplemented by*, 307 NLRB 769 (1992), *enf'd*, 990 F.2d 622 (2nd Cir. 1993) (same). In *Metro Center*, 267 NLRB at 298, the respondent was aware of the union organizing activity, but did not know who the union organizers were. When questioned about the unions, the three dischargees denied that they knew of any union activity and one of them even offered to advise the employer if he heard anything. *Metro Center*, 267 NLRB at 299. As in *Metro Center*, the record establishes merely that Electro-Voice had general knowledge of general union activity. There is no evidence that anyone involved in the discharge decisions — Mr. Graham, Mr. Melton, and Ms. Warren — had any specific knowledge of which employees were union organizers or even who had executed union authorization cards. Mere operation of a small plant, without more, is insufficient to support an inference of employer knowledge of union activity. *See Hackett Precision Co. v. NLRB*, 459 F.2d 463 (6th Cir. 1972); *Basin Frozen Foods, Inc.*, 307 NLRB 1406, 1409-1410 (1992). Furthermore, the small plant doctrine is not applicable where the union activity is secretive and kept from the employer. *NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966); *Gold Coast Restaurant Corp.*, 304 NLRB 750 (1991), *enf'd in part*, 995 F.2d 257 (D.C. Cir.), *amended*, Civ. No. 91-1533, 1993 WL 44597 (D.C. Cir. Oct. 25, 1993).

The evidence in *Chicago Tribune Co. v. NLRB*, 962 F.2d 712 (7th Cir. 1992), was held insufficient to support a finding that the employer's reasons for employee discipline and discharges were pretextual or of dual motive. Although the Tribune knew that the employee was a union activist who

actively sought union representation, the evidence showed that the discharged employee's poor work record predated the petition for a union election. 962 F.2d at 717-718. The court reasoned that "neither an employee's union activism nor an employer's knowledge of that activism constitutes sufficient evidence for a finding of antiunion animus." *Chicago Tribune*, 962 F.2d at 717. Although coincidence in timing between an employee's discharge and union activity is a factor to be considered, mere coincidence is insufficient to support a finding of union animus. 962 F.2d at 717-718. Under *Chicago Tribune*, the coincidental timing of Electro-Voice's discharges and the union organizing activity is insufficient, without more, to support a finding of unlawful motivation.

The Director contends that Electro-Voice did not give poor performance as a reason for the discharge of Mr. Kendall, Mr. Havens, and Mr. Shaffer. Implausible or shifting explanations for allegedly unlawful discharge may support an inference that the discharge was prohibited under the law, *Chicago Tribune*, 962 F.2d at 719; *NLRB v. Industrial Erectors, Inc.*, 712 F.2d 1131, 1137 (7th Cir. 1993), but evidence in this record supports Electro-Voice's determination of poor performance, so the Board need not find this explanation implausible. Electro-Voice's explanation that Mr. Kendall, Mr. Havens, and Mr. Shaffer were discharged not only for poor attendance but also for poor performance is not a shift in explanation. Electro-Voice maintains that those employees were discharged for poor attendance. That Electro-Voice now offers an explanation in addition to that given to the employees at the time of their discharge does not constitute a true shift warranting an inference of unlawful discharge. They were told they were being discharged for poor attendance.

Assuming that the Director establishes that the discharges were unlawfully motivated, the Board is quite likely to find that Electro-Voice has established by a preponderance of the evidence that it would have discharged the employees regardless of their protected activity. Evidence of employer hostility toward the union, knowledge of the discharged employee's union activity, timing of the action, and implausible or shifting explanations for the allegedly unlawful action may be considered on this issue. *Chicago Tribune*, 962 F.2d at 719; *Industrial Erectors, Inc.*, 712 F.2d at 1137. Again, there is no evidence that anyone involved in the discharge decisions had specific knowledge of which employees were involved in the union activity. The evidence shows that in late 1993 labor efficiencies had fallen and Electro-Voice first attempted to address the problem by giving its employees higher wages. Since the higher wages did not remedy the problems and employee complaints over absenteeism surfaced, Mr. Graham decided that a correlation existed between employee attendance and efficiencies. On that basis, Mr. Graham decided to terminate nine employees. The discharges were in compliance with Electro-Voice's attendance policy which reserved in Electro-Voice the right to discharge an employee with less than 13 attendance points who had become an undependable employee. The court cannot say a reasonable probability exists that the Board will find that the Electro- Voice's stated reasons for discharging the nine employees are pretext for unlawful motives.

Furthermore, Electro-Voice has presented evidence that would demonstrate a correlation between attendance and productivity and that it is for this reason that Electro-Voice discharged its employees. Absenteeism had a substantial impact on employee productivity at the Mishawaka plant. Ms. Buford conceded that absenteeism caused a line to shut down and affected productivity. Michelle Kincses agreed that

absenteeism shut down a line. Frank Simon testified that absenteeism slows down productivity as well. December Barrows and Linda Vore testified that when an employee is absent, another employee must fill that position which slows production and leads to mistakes. Kathy Nash and Paul Grasso testified that absenteeism lowered productivity and quality. A number of other witnesses for Electro-Voice testified that absenteeism was a significant problem that affected employee efficiency. On this record, the Board seems likely to find that poor attendance has greatly impacted productivity at the Mishawaka plant, and that production and efficiency improved after the July discharges, although improvements were not immediate. Based on these findings, the Board could further conclude that Electro-Voice has established by a preponderance of the evidence that it would have discharged the nine employees regardless of their protected conduct.[12]

Upon considering the strength of the Director's case as to each alleged unfair labor practice, the court cannot find that the Director has shown a "better than negligible" chance of prevailing before the Board. The Board may find that some of the alleged unfair labor practices violated the Act. On the other hand, the Board may find no violation. As in *Fleishut v. Avondale Indus., Inc.*, Civ. A. No. 94-3500, 1995 WL 27464 at **4-5 (E.D. La. Jan 23, 1995), Electro-Voice has offered legitimate grounds for the allegedly unfair labor practices and

---

[12] In any event, "[t]he Board [is not] to substitute its judgment for that of an employer in deciding whether there are good or bad reasons for discharge." *Central Freight Lines, Inc.*, 255 NLRB 509, 510 (1981), *enf'd*, 662 F.2d 238 (5th Cir. 1982). The Act does not require an employer to exercise good business judgment and does not create a remedy when the employer exercises bad business judgment. *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 673-74 (1st Cir. 1979); *Wagoner Water Heater Co.*, 203 NLRB 518, 519 (1973).

presented evidence as to the lack of specific knowledge of union activity. Because the evidence of unfair labor practices is equivocal, the court finds that the Director has a marginal likelihood of success on the merits. *See Fleishut*, 1995 WL 27464 at **4-5 (E.D. La. Jan 23, 1995); *Johnston v. Stevens & Co.*, 57 LRRM (BNA) 2322, 2326 (W.D.S.C. 1964), *enf'd*, 341 F.2d 891 (4th Cir. 1965); *but see Zipp v. Caterpillar, Inc.*, 858 F.Supp. 794, 798-99 (C.D. Ill. 1994). Consequently, the Director must make a strong showing of irreparable harm, show that the equities balance in her favor, and show that the preliminary injunction is in the public interest. *See Roland Machinery Co. v. Dresser Indus.*, 749 F.2d 380, 387-88 (7th Cir. 1984); *Pye v. Syllivan Bros. Printers, Inc.*, 38 F.3d 58, 67 (1st Cir. 1994). This the Director cannot do.

B. *Irreparable Harm*

The Director contends first, that the Electro-Voice employees are being chilled in exercising their rights under the Act, such that a fair election is not possible; and second, that the employees are losing the benefit of collective bargaining in the interim, which has been recognized as a harm that the Board's final order cannot remedy. *See Asseo v. Pan American Grain Co.*, 805 F.2d 23, 27 (1st Cir. 1986); *Seeler v. Trading Port, Inc.*, 517 F.2d 33 (2nd Cir. 1975).

In determining whether irreparable injury exists and in balancing the equities, the court should consider "the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." *Miller v. California Medical Center*, 19 F.3d 449, 460 (9th Cir. 1994); *see also Asseo v. Centro Medico del Turabo*, 900 F.2d 445, 454 (1st Cir. 1978). If the Director and the employer both establish hardship, the court must determine

whether the balance weighs in the Director's favor. *Miller*, 19 F.3d at 460-61.

In determining whether the Director has shown irreparable harm, the court should consider: (1) whether an injunction is necessary to prevent frustration of the remedial purposes of the Act; (2) whether the public interest is affected by a continuing violation; and (3) the need of returning to the status quo. *Szabo v. P*I*E Nationwide, Inc.*, 878 F.2d 207, 210 (7th Cir. 1989); *Eisenberg v. Lenape Products, Inc.*, 781 F.2d 999, 1005 (3rd Cir. 1986); *Zipp v. Caterpillar, Inc.*, 858 F.Supp. 794, 799 (C.D. Ill. 1994). In *Szabo*, the court denied the 10(j) petition where the Director failed to establish that the alleged unfair labor practices chilled the employees' exercise of their statutory rights. Since the court found no evidence that the employees were afraid to file grievances with the NLRB, the court concluded that the NLRB's fear of a chilling effect was "mere speculation at best." *Szabo*, 878 F.2d at 210 The court explained that any chilling effect on other employees was caused by the discharged employee who told other employees about his alleged retaliatory discharge, rather than by the employer. *Szabo*, 878 F.2d at 210.

The Director contends that a chilling effect can be presumed. The court disagrees. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-14 (1969), *reh'g denied*, 396 U.S. 869 (1969), does not stand for the proposition that a chilling effect on employee union activity can be presumed. Under *Gissel Packing Co.*, 395 U.S. at 601, the court must presume the validity and reliability of authorization cards designating union as bargaining agent, absent contrary evidence. *Gissel Packing Co.*, 395 U.S. at 613-14, held that a bargaining order is appropriate in "exceptional" situations with "outrageous" and "pervasive" unfair labor practices and in "less extraordinary" situations where the employer's unfair labor

practices render a fair election unlikely or undermining a union's majority. *See also Foster Elec.*, 308 NLRB 1253, 1264 (1993); *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982), *supplemented*, 281 NLRB 1157 (1986); *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1082 (7th Cir. 1981) (probable impact of violations increases with a small bargaining unit). *Gissel*'s holding assumed past effects on election conditions. The court explained that a bargaining order is appropriate given a card majority and " [i]f the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election . . . is slight . . . ." 395 U.S. at 614-15.

The Director further relies on either Section 10(l) enforcement decisions rather than Section 10(j) decisions, *see NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982); *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074 (7th Cir. 1981); *Q-1 Motor Exp. Inc.*, 308 NLRB 1267 (1993), *review denied, enf'd*, 25 F.3d 473 (7th Cir. 1994), *cert denied*, 115 S.Ct. 725 (1995), or on Section 10(j) decisions with repeated and flagrant unfair labor practices, *see Asseo v. Pan American Grain Co.*, 805 F.2d 23, 27 (1st Cir. 1986) (refusal to hire union organizing leader), and *Seeler v. Pan American Grain Co.*, 517 F.2d 38 (2nd Cir. 1975). To the extent that *Asseo* and *Seeler* permit the issuance of an injunction absent any showing of actual injury, they are contrary to the law in this circuit. *See Szabo v. P*I*E Nationwide, Inc.*, 878 F.2d 207, 210 (7th Cir. 1989). In this circuit, the court does not presume a chilling effect; rather, the Director beads the burden of proving any chilling effect on employees' exercise of their rights under the Act. *Szabo*,

878 F.2d at 210; *Zipp v. Caterpilar Inc.*, 858 F.Supp. 794 (C.D. Ill. 1994).[13]

To satisfy this burden, the Director offers the testimony of Al Warzecha and Linda Vore to establish the alleged chilling effect on the union organizing efforts, claiming that because of the discharges, the union has lost majority support and that a fair election is not possible. As Electro-Voice contends, Mr. Warzecha's testimony is mostly hearsay, and Ms. Vore's is inconsistent. Moreover, Sandy Weaver's testimony appears to have been mischaracterized. The Director claims that Ms. Weaver testified that "she and several other employees feared for their jobs because of the discharges." Ms. Weaver testified that some employees expressed fear, but contrary to the Director's assertion, she did not testify that she feared for her job and did not testify as to the source of the employees' fear.

Even the Director's own witnesses testified that the union organizing drive is proceeding. Tracie Bentley, a discharged and then reinstated employee, testified that she would attend a post-termination union meeting. The July 9 union meeting was attended by the dischargees and at least two other Electro- Voice employees. The union organizing committee has remained intact, is confident that the union has support within the Mishawaka plant, and is "in the process of having a meeting."

---

[13] The Director also cites to three appellate decisions, *see Pascarell v. Vibra Screw*, 904 F.2d 874, 880 (3rd Cir. 1990); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047 (2nd Cir. 1980); *Angle v. Sacks*, 382 F.2d 655, (10th Cir. 1967), none from the Seventh Circuit, for the proposition that the Director need not demonstrate actual impact on the employees for an injunction to issue. Those cases are contrary to the law of this circuit.

As in *Szabo*, the Director has not shown that it is more likely than not that the alleged unfair labor practices chilled the employees' exercise of their statutory rights. The alleged chill is "mere speculation at best." *Szabo*, 878 F.2d at 210. Any chilling effect that might exist is attributable to Mr. Warzecha who first warned the employees that Electro-Voice would or could threaten to close the plant, rather than to any management at Electro-Voice. *Szabo*, 878 F.2d at 210.

Even if the discharges had chilled the employees union organizing efforts, an interim bargaining order is not appropriate. An interim bargaining order is an appropriate remedy when the employer repeatedly has violated the Act by threatening plant closure by a high-ranking member of management to the entire work force, where the employer has committed other violations of the Act, and where the employer has thwarted the union activity by terminating a substantial portion of the work force. *Foster Elec., Inc.*, 308 NLRB 1253, 1258-59 (1992); *Q-1 Motor Exp., Inc.*, 308 NLRB 1267 (1992). The record, unlike that in *Foster Elec.*, 308 NLRB at 1258-59, and *Q-1 Motor Exp., Inc.*, 308 NLRB at 1268, does not clearly establish that the employer made frequent threats about closing shop prior to the union election, and at times linked the closing with the need for higher wages and benefits attributable to the union. Electro-Voice's work force is relatively small and Electro-Voice has a history of amicable relations with unions. As in *Eisenberg v. Lenate Prod., Inc.*, 781 F.2d 999, 1005 (3rd Cir. 1986), and *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1194 (5th Cir.), *reh'g denied*, 521 F.2d 795 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976), the dischargees, all but one of whom testified that they would return to Electro-Voice even if they found other employment, will be able to return to their positions and start up in the same place they left off with union organizing activities.

The Director contends, citing *Somerset Welding & Steel*, 304 NLRB 32 (1991), and *Salvation Army Residence*, 293 NLRB 944, 945 (1989), that a bargaining order is appropriate because Jay Melton's continued presence as plant manager reinforces the "lingering effects" of Electro-Voice's alleged unlawful labor practices in the employees' minds. In July 1994, however, Mr. Melton was replaced by Paul Grasso.

The Director's delay in filing the Section 10(j) complaint in this case is "some evidence" that the harm caused by allegedly discriminatory discharges already has taken place. *Boire*, 515 F.2d at 1193 (delay of three months); *Sharp v. La Siesta Foods, Inc.*, 859 F.Supp. 1370, 1375 (D. Kan. 1994) (delay of four months from termination to filing of petition).[14] Contending that an interim order should include reinstatement, the Director cites to studies of Board reinstatement orders showing that employees accept reinstatement offers shortly following discharge, but the rate of acceptance decreases markedly with the passage of time. *See* Weiler, *Promises to Keep: Securing Worker's Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1791-93 (June 1983). Thus, an interim bargaining order would serve little useful purpose and would not be more effective than a final Board order in remedying any effects of Electro-Voice's alleged unfair labor practices. *Sharp* 859 F.Supp. at 1375.

The Director contends, citing *Asseo v. Pan American Grain Co.*, 123 LRRM 2996, 3000 (5th Cir. 1986), that the public has an interest in the furtherance of the Act's purposes. While this is no doubt true, it does not relieve the Director of

---

[14] The court agrees that in all other respects the adequacy and scope of the pre-filing investigation is irrelevant. See February 17 Order at 7 and 9.

the burden of proving that a preliminary injunction is in the public interest. *Szabo v. P*I*E Nationwide, Inc.*, 878 F.2d at 210. The Director must show that the public would suffer harm if the court denies the petition for Section 10(j) relief. The court cannot find that the Director has satisfied her burden in this regard.

The Director contends that an interim bargaining order would restore the status quo. Because the "status quo" is the "period prior to any union activity," *Boire v. Freight Carriers, Inc.*, 515 F.2d at 1193-94 (5th Cir.), an interim bargaining order would not restore the status quo, but rather would alter it. As in *Boire*, the court is presented with an uncertified union, although claiming to have a card majority, 515 F.2d at 1193, and an employer having no prior bargaining relationship with each other. An interim bargaining order would alter the status quo.

The Director has not satisfied her burden of proving by a preponderance of the evidence irreparable harm.

C. *Balance of Harms*

Although the Director contends that the Union, employees, and the public interest will suffer if an injunction is not issued, she has not come forward with evidence that the balance of harms weighs in favor of a preliminary injunction ordering an interim bargaining order, interim reinstatement of the dischargees, and a broad cease and desist order. The Director argues that interim reinstatement of the remaining dischargees could not cause any harm since Electro-Voice already has reinstated four dischargees.

The remaining dischargees, however, include the two worst attendance offenders, Buford and Barrows, and three employees (Kendall, Havens, and Shaffer) thought to be of poor quality. Electro-Voice contends that an interim

bargaining order would impose a serious burden in meeting the good faith bargaining standards. Electro-Voice has presented evidence that the absenteeism negatively affected labor efficiencies, production and employee morale. In light of that correlation, reinstatement of the two employees with the poorest attendance records would negatively impact labor efficiencies, production, and employee morale. That Kendall, Havens, and Shaffer were not discharged because of poor performance does not preclude the court from considering the harmful effect their poor performance had on Electro-Voice and would have if they were reinstated. An order mandating the reinstatement of these employees would harm Electro-Voice.

Additionally, the court finds merit in Electro-Voice's contention that an interim bargaining order would position Electro-Voice such that any action taken against a union supporter would make Electro-Voice vulnerable to an action for contempt for violating the court's Section 10(j) injunction. As the *Fleishut* court recognized, the resulting effect would not serve the public interest. *Fleishut v. Avondale Indus., Inc.*, Civ. A. No. 94-3500, 1995 WL 276464, at *5-6 (E.D. La. Jan 23, 1995).

The Director has not carried her burden of proving by a preponderance of the evidence that the balance of harms are in favor of the issuance of a preliminary injunction. Because the Director's likelihood of success on the merits is minimal at best, because the Director has not proved irreparable harm or that a preliminary injunction is in the public interest, and because the balancing of the harms counsels against a preliminary injunction, the Section 10(j) petition must be denied.

D. *Remaining Issues*

Because the court has reached its decision without considering whether the Director followed the standards set forth in its Section 10(j) Manual, except to the extent that the delay impacts on irreparable harm, the court finds that the Director's motion to strike the portions of Electro-Voice's brief referring to such procedures should be denied as moot.

Finding oral argument on the petitioner's motion for Section 10(j) injunction unnecessary, the court denies the petitioner's motion for oral argument.

III.

For the foregoing reasons, the court:

(1) DENIES petitioner's motion for preliminary injunction under Section 10(j) of the NLRA, as amended (filed December 20, 1994 (#1));

(2) DENIES respondent's motion for oral argument on petitioner's motion for 10(j) injunction (filed March 7, 1995 (#39)); and

(4) DENIES AS MOOT petitioner's motion to strike Section E-3 entitled "Internal Board Guidelines" located on pages 52-55 of respondent's brief in opposition (filed March 14, 1995 (#49)).

SO ORDERED.

ENTERED: May 4, 1995

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

cc: W. Steele, R. Simon
T. Barnes, J. Stadler

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

July 18, 1996

Mr.Gerald C. Smetana
Smetana & Avakian
333 W. Wacker Drive, Ste. 1015
Chicago, IL 60606

Re: Electro-Voice, Incorporated
v. National Labor Relations Board
Application No. A-35

Dear Mr. Smetana:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on July 18, 1996, extended the time to and including September 23, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Clayton R. Higgins, Jr.
Clayton R. Higgins, Jr.
Assistant Clerk

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
April 26, 1996

By the Court:

National Labor Relations Board,
Plaintiff-Appellant,

No. 95-2611

V.

Electro-Voice, Incorporated,
Defendant-Appellee.

Appeal form the United States District Court for the Northern District of Indiana, South Bend Division.

No. 94 C 1037, Robert L. Miller, Jr., Judge.

Upon Consideration of:

1. Motion of the National Labor Relations Board to Dismiss Appeal as Moot and to Vacate the District Court's Opinion filed April 9, 1996, by counsel;
2. Motion of the National Labor Relations Board to Withdraw Motion to Dismiss Appeal as Moot and to vacate the District Court's Opinion filed April 22, 1996, by counsel; and
3. Memorandum of Law in support of National Labor Relations Board's Motion to Withdraw Motion to Dismiss appeal as Moot and to vacate the District Court's Opinion filed April 25, 1996, by counsel;

as well as Electro-Voice, Incorporated's representation that it would not be filing a response to #2

IT IS ORDERED that #2 is GRANTED. The National Labor Relations Board's motion to dismiss appeal as moot and to vacate the District Court's decision is WITHDRAWN.

In the United States Court of Appeals
for the Seventh Circuit

ELECTRO-VOICE, INC.,	)	
	)	
Petitioner,	)	
	)	NO.
V.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent.	)	

PETITION FOR REVIEW

NOW COMES Eletro-Voice, Inc. and respectfully petitions the Seventh Circuit to review the decision of the *National Labor Relations Board v. Electro-Voice Inc.* an International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO Case 25-CA-23319 (decided March 29, 1996), pursuant to Section 10 (e) & (f) of the National Labor Relations Act as amended.

This Petition is filed in good faith and not for purposes of delay.

Respectfully submitted

Gerard C. Smetana
SMETANA & AVAKIAN
39 S. LaSalle, Suite 1218
Chicago, IL 60603
(312) 357-0250
Counsel for Petitioner
Electro-Voice

OF COUNSEL
Neil M.B. Rowe
Ryan & Nelson
444 East Algonquin Road
Arlington Heights, IL
60005
847-437-7700

OF COUNSEL
James Stadler
Varnum,Riddering,Schmid
& Howlett, LLP
Bridge Water Place
P.O. Box 352
Grand Rapids, MI 49501
616-336-5626

Dated September 18, 1996

Supreme Court, U.S.
FILED
NOV 25 1996
CLERK

(2)

No. 96-469

In the Supreme Court of the United States

OCTOBER TERM, 1996

ELECTRO-VOICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

29 pp

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Regional Director of the National Labor Relations Board (Board) was entitled to interim injunctive relief, pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), pending the Board's disposition of an administrative complaint against petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	20
Appendix A	1a
Appendix B	3a

TABLE OF AUTHORITIES

Cases:

Arlook v. *S. Lichtenberg & Co.*, 952 F.2d 367 (11th Cir. 1992)	15
Barbour v. *Central Cartage, Inc.*, 583 F.2d 335 (7th Cir. 1978)	10
Boire v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185 (5th Cir. 1975), cert. denied, 426 U.S. 934 (1976)	15
Dove v. *United States*, 423 U.S. 325 (1976)	13
Electro-Voice, Inc.:	
320 N.L.R.B. No. 134 (Mar. 29, 1996)	6
321 N.L.R.B. No. 63 (June 5, 1996)	6, 8
Fleischut v. *Nixon Detroit Diesel, Inc.*, 859 F.2d 26 (6th Cir. 1988)	15
Frye v. *Specialty Envelope, Inc.*, 10 F.3d 1221 (6th Cir. 1993)	15, 18
Gay v. *Ruff*, 292 U.S. 25 (1934)	12
Kaynard v. *Mego Corp.*, 633 F.2d 1026 (2d Cir. 1980)	15
Kinney v. *Pioneer Press*, 881 F.2d 485 (7th Cir. 1989)	7, 15, 16, 17
Kobell v. *Suburban Lines, Inc.*, 731 F.2d 1076 (3d Cir. 1984)	15, 18
McLeod v. *General Elec. Co.*, 385 U.S. 533 (1967)	17

Cases—Continued: Page

Miller v. *California Pacific Medical Center*, 19 F.3d 449 (9th Cir. 1994) 10, 13, 16, 19
Murphy v. *Hunt*, 455 U.S. 478 (1982) 12
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969) 4
Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) 12
Pye v. *Sullivan Bros. Printers, Inc.*, 38 F.3d 58 (1st Cir. 1994) 17, 19
Rivera-Vega v. *Conagra, Inc.*, 70 F.3d 153 (1st Cir. 1995) 9, 15, 19
Roland Machinery Co. v. *Dresser Indus. Inc.*, 749 F.2d 380 (7th Cir. 1984) 18
Sears, Roebuck & Co. v. *Carpet Layers, Local Union No. 419*, 397 U.S. 655 (1970) 10
Silverman v. *Major League Baseball Player Relations Committee, Inc.*, 67 F.3d 1054 (2d Cir. 1995) 15
United States v. *Munsingwear*, 340 U.S. 36 (1950) 14
Weinstein v. *Bradford*, 423 U.S. 147 (1975) 12

Statutes and rules:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 3, 6
§ 8(a)(3), 29 U.S.C. 158(a)(3) 3, 6
§ 8(a)(5), 29 U.S.C. 158(a)(5) 3, 6
§ 10(j), 29 U.S.C. 160(j) ..... *passim*
§ 10(*l*), 29 U.S.C. 160(*l*) 10
28 U.S.C. 2101(e) 11
Fed. R. App. P. 4(a)(1) 12
Sup. Ct. R.:
Rule 10 13
Rule 11 11

Miscellaneous: Page

13A Charles Alan Wright, et al., *Federal Practice and Procedure* (2d ed. 1984 & Supp. 1996) 14
Robert L. Stern, et al., *Supreme Court Practice* (7th ed. 1993) 14

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-469

ELECTRO-VOICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 83 F.3d 1559. The opinion of the district court (Pet. App. 39a-74a) is reported at 149 L.R.R.M. (BNA) 2476. The subsequent decision and order of the district court dismissing this action as moot (App., *infra*, 1a-4a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a) was entered on April 26, 1996. On July 18, 1996, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 23, 1996 (Pet. App. 75a), and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures fiberglass stadium horns, electronic cross-over panels, and cables for military headsets at a plant in Mishawaka, Indiana. Pet. App. 2a. In early 1994, employees working at the Indiana plant began to raise various work-related concerns with management. *Id.* at 3a. In January or February, employee Pam Buford informed petitioner's human resources manager, Minnie Warren, that employees were dissatisfied with plant manager Dennis Northam and with working conditions in the plant. Buford requested a meeting with Warren to discuss these matters. *Ibid.* Two weeks later, Northam and another management official met with the employees and informed them that no changes would be made. *Ibid.* Employees also approached a supervisor about obtaining additional exhaust fans to alleviate excessive heat and air pollution in the plant; their request was also denied. *Id.* at 3a-4a.

In May 1994, having received no action from management on her complaints, Buford met with her co-workers to discuss forming a union. In June, she contacted a representative of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (Union). Pet. App. 2a, 4a. A Union meeting was held on June 22, 1994. At that meeting, 21 of the 30 plant employees signed union authorization cards, and 11 employees volunteered to serve on an organizing committee. *Id.* at 5a, 24a. On July 7, 1994, the Union requested that petitioner voluntarily recognize it as the employees' collective-bargaining representative. The Union also filed a

representation petition with the National Labor Relations Board (Board). *Id.* at 8a, 45a.

The same day, after receiving the Union's request for recognition, Ronald Graham, petitioner's vice-president of human resources, ordered the termination of any employee who had accumulated more than seven absentee "points," or who had been employed by petitioner for less than six months and had accumulated "a good number of points." Pet. App. 8a. The new rules represented a sudden departure from the company's existing written attendance policy. *Ibid.* Pursuant to Graham's directive, nine employees were immediately fired and replaced by personnel supplied by a temporary employment service. Each of the nine dischargees had signed a Union authorization card and five of the nine had volunteered to work on the organizing committee. *Id.* at 9a.

On July 8, 1994, the day after the discharges, the Union held a meeting, which was attended by only one or two employees. Pet. App. 9a. Petitioner subsequently remedied various complaints that the employees had earlier voiced about their working conditions, including providing them with requested fans and tools, and adding seats in the break room. *Id.* at 9a-10a. The Union held no further meetings with employees after July 8. *Id.* at 10a.

2. a. On October 18, 1994, acting on unfair labor practice charges filed by the Union, the Board's Regional Director issued an administrative complaint against petitioner. The administrative complaint alleged that petitioner violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), (3), and (5), by, among other things, discharging employees in retaliation for supporting the Union, threatening employees with plant closure

if they chose Union representation, and unlawfully soliciting and remedying employee grievances in order to thwart union efforts. Pet. App. 10a. On December 19, 1994, a hearing on the administrative complaint commenced before an administrative law judge. The next day, December 20, 1994, the Regional Director filed a petition in federal district court, seeking interim injunctive relief against petitioner pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j).[1] Pet. App. 10a. The Regional Director requested, *inter alia*, that the district court order petitioner to bargain with the Union on an interim basis pursuant to *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969),[2]

---

[1] Section 10(j) provides in relevant part:

> The Board shall have power, upon issuance of a complaint * * * charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred * * *, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court * * * shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. 160(j).

[2] Under *Gissel*, the Board may order an employer to bargain with a union, rather than conduct an election, where employee authorization cards establish that the union at one time enjoyed majority support in the bargaining unit, and the Board finds that "the possibility of erasing the effects of past [unfair labor] practices and of ensuring a fair election * * * by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." 395 U.S. at 614-615.

pending the Board's adjudication of the unfair labor practice complaint. Pet. App. 67a-68a, 70a.

b. On May 5, 1995, the district court denied the Regional Director's petition for Section 10(j) relief. Pet. App. 38a. The court explained that, in ruling on a Section 10(j) petition, it "must determine solely whether a preliminary injunction * * * is 'just and proper,'" and that, "[t]o determine whether an injunction would be 'just and proper,' this court must apply the traditional test in equity." *Id.* at 50a (internal quotation marks omitted). The court further stated that, "[u]nder the traditional test, * * * the [Regional] Director must show: (1) a reasonable likelihood of success on the merits; (2) an inadequacy of a remedy at law or threat of irreparable harm if an injunction is not issued; (3) the balance of the threatened harms if an injunction is issued against the threatened harms if an injunction is not issued; and (4) that the preliminary injunction would serve the public interest." *Ibid.* Applying those principles, the court declined to issue an interim injunction. *Id.* at 51a-73a.[3] The Board filed a notice of appeal from the judgment of the district court on July 3, 1995. *Id.* at 35a.

3. On March 29, 1996, while the Board's appeal in the Section 10(j) case was pending before the court of appeals, the Board issued a decision and order in the

---

[3] The district court did not conduct an evidentiary hearing with respect to the petition. Instead, it relied on the transcript of the hearing before the administrative law judge, supplemented by additional evidentiary material. Pet. App. 10a-11a. Based on those materials, the court concluded that the Regional Director had not demonstrated a likelihood of success on the merits, and had not met the other requirements of the traditional equitable test for injunctive relief. *Id.* at 66a, 72a, 73a.

underlying unfair labor practice proceeding. *Electro-Voice, Inc.*, 320 N.L.R.B. No. 134 (Mar. 29, 1996). The Board sustained the allegations of the Regional Director's administrative complaint, finding that petitioner, in violation of Section 8(a)(1), (3), and (5) of the Act, had (among other things) unlawfully fired employees, threatened employees with plant closure, solicited and remedied employee grievances, coercively interrogated employees, and unilaterally changed its absenteeism policy. Slip op. 1-4, 16-19. The Board found that petitioner's "well-orchestrated, intensive" conduct had "effectively killed off the Union's organizational campaign and proclaimed to the employees that self-organization would not be tolerated." *Id.* at 4. Concluding that the possibility of holding a fair election was unlikely in light of the "egregious" nature of petitioner's misconduct, the Board, *inter alia*, issued a *Gissel* bargaining order. *Id.* at 3-4 & n.7.

On April 16, 1996, petitioner filed with the Board a motion for reconsideration and to reopen the administrative record for the purpose of receiving additional evidence bearing on the propriety of the *Gissel* order. On April 19, petitioner filed a supplemental motion. See *Electro-Voice, Inc.*, 321 N.L.R.B. No. 63 (June 5, 1996), slip op. 1.

4. On April 26, 1996, while the above-noted motions were pending before the Board, the court of appeals reversed the district court's denial of the Regional Director's petition for Section 10(j) relief. The court of appeals remanded the case to the district court for the entry of an injunction against petitioner, including an interim *Gissel* bargaining order. Pet. App. 1a-32a.

The court of appeals agreed with the district court that, in determining whether the Regional Director is entitled to Section 10(j) relief, courts "should 'evaluate the propriety of the Director's request with an eye toward the traditional equitable principles that normally guide such an inquiry.'" Pet. App. 12a (quoting *Kinney* v. *Pioneer Press*, 881 F.2d 485, 490 (7th Cir. 1989)). The court of appeals concluded that the district court had erred, however, in determining the Regional Director's burden of proof with respect to those criteria. *Id.* at 14a. The court explained that, in order to obtain interim injunctive relief under Section 10(j), the Regional Director must establish: (1) that there is no adequate remedy at law, *i.e.*, "that an award of damages would be seriously deficient"; (2) that public harm would result absent the injunction; (3) that the "labor effort" would be irreparably harmed absent the injunction, and that that harm would outweigh any irreparable harm to the employer; and (4) that the Regional Director has "some likelihood of succeeding on the merits." *Id.* at 14a-15a (internal quotation marks omitted). The court further explained that "some likelihood of succeeding on the merits" means "a better than negligible chance" of success. *Id.* at 15a, 17a (internal quotation marks omitted).

The court stated that the Regional Director "must satisfy the first two requirements by a preponderance of the evidence" and "must also show irreparable harm by a preponderance of the evidence." Pet. App. 14a-15a. The court further explained, however, that a "sliding scale" analysis applies "between the likelihood of success and the balancing of the harms"; the Regional Director "need not demonstrate that the harm to the labor effort outweighs the harm to the

employer if the Director makes a strong showing under the fourth requirement. * * * In other words, a strong showing by the Director of likely success on the merits can offset a weak showing of harm." *Id.* at 15a.

Applying the above principles, the court concluded that the Regional Director was entitled to Section 10(j) relief in this case. Pet. App. 15a-31a. It found that the Regional Director had established a sufficient likelihood of success on the merits of the unfair labor practice complaint (*id.* at 17a, 23a, 25a); that she had made "a sufficient demonstration of irreparable harm to the collective bargaining process" for which there was no adequate remedy at law, and that petitioner had "offered no countervailing demonstration of irreparable harm that would result from a grant of injunctive relief" (*id.* at 27a); and that "[t]here is no evidence that public harm would result from injunctive relief" (*id.* at 28a). The court therefore remanded the case to the district court for the entry of an interim injunction against petitioner. *Id.* at 32a.

5. On June 5, 1996, the Board issued an order denying petitioner's pending motions in the unfair labor practice proceeding. *Electro-Voice, Inc.*, 321 N.L.R.B. No. 63 (June 5, 1996). In light of the Board's issuance of a final order in the administrative proceeding, the Regional Director, on July 17, 1996, filed a motion with the district court, seeking voluntary dismissal of her Section 10(j) petition on the ground of mootness.[4] On July 23, 1996, the district court

---

[4] After the Board issued its initial decision and order, the Regional Director had filed with the court of appeals a motion to dismiss her appeal as moot. Pet. App. 34a-37a. After petitioner filed its motions for reconsideration and to reopen the

entered a judgment granting the Regional Director's motion and dismissed the Section 10(j) action. App., *infra*, 1a-2a. In an accompanying memorandum, the district judge stated that "final adjudication has occurred before the National Labor Relations Board," and that "the [Regional Director's] action under Section 10(j) * * * is therefore moot." *Id.* at 3a-4a. Petitioner did not appeal the district court's dismissal order, and no injunction was ever issued against petitioner.[5]

ARGUMENT

Petitioner seeks review of the court of appeals' decision that interim relief under Section 10(j) was warranted in this case. Because the Board's subsequent resolution of the underlying unfair labor practice charges against petitioner resulted in the termination of any interim relief, this case is now moot. Moreover, because the decision below would not otherwise warrant this Court's review, the petition should be denied.

1. Section 10(j) of the Act "authorizes the NLRB to seek, and the United States district courts to grant, interim relief pending the NLRB's resolution of unfair labor practices." *Rivera-Vega* v. *Conagra, Inc.*, 70 F.3d 153, 158 (1st Cir. 1995). Thus, "a § 10(j) injunction exists only so long as the charges are pending" before the Board; and any "temporary

---

administrative record with the Board, however, the Regional Director requested, and the court of appeals granted, leave to withdraw the Regional Director's motion. *Id.* at 76a.

[5] The company has filed a petition for review of the Board's order in the underlying unfair labor practice case. That proceeding is now pending in the court of appeals. See Pet. App. 77a-78a.

relief" granted the Regional Director pursuant to Section 10(j) "expire[s]" once "the Board has issued its final order" in the underlying administrative proceeding. *Miller* v. *California Pacific Medical Center*, 19 F.3d 449, 453, 461 (9th Cir. 1994) (en banc). Thus, as a general rule, "resolution of a § 10(j) injunction proceeding is rendered moot by the NLRB's decision on the merits of an unfair labor practice complaint." *Id.* at 453; accord *Barbour* v. *Central Cartage, Inc.*, 583 F.2d 335, 336-337 (7th Cir. 1978). Cf. *Sears, Roebuck & Co.* v. *Carpet Layers, Local Union No. 419*, 397 U.S. 655 (1970) (per curiam) (injunction proceedings under Section 10(*l*) of the Act, 29 U.S.C. 160(*l*)).[6] Accordingly, this case became moot on June 5, 1996, when the Board denied petitioner's motions for reconsideration of its March 29, 1996 unfair labor

---

[6] Section 10(*l*) of the Act requires the Board, upon finding "reasonable cause" to believe that a labor organization has engaged in a secondary boycott, or certain other proscribed activity, to petition a federal district court for temporary injunctive relief. Like Section 10(j), Section 10(*l*) empowers the court "to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law." 29 U.S.C. 160(*l*). In *Sears*, the Court held that the question whether the court of appeals had erred in holding that Sears lacked standing to appeal from the district court's denial of the Regional Director's Section 10(*l*) petition for an interim injunction against the union was rendered moot by the Board's final order in the underlying administrative proceeding. 397 U.S. at 657. The Court explained that, "even if the Court of Appeals was wrong in dismissing Sears' appeal, any relief that that court might have given would now have terminated," because "any injunction issued pursuant to that section terminates when the Board resolves the underlying dispute." *Id.* at 657-659.

practice decision. In recognition of that fact, the district court, on July 23, 1996, granted the Board's motion to dismiss the Section 10(j) proceeding as moot, rather than entering the interim injunction directed by the court of appeals. App., *infra*, 1a-4a.

Petitioner concedes (Pet. 17) that, "[b]ecause the N.L.R.B. has reached final adjudication, the underlying injunction is no longer of any purpose." Petitioner suggests (*ibid.*), however, that this Section 10(j) case is nonetheless not moot because it is one "capable of repetition, yet evading review." Petitioner lacks a jurisdictional basis for raising that contention, and, in any event, the contention lacks merit. On remand from the court of appeals, the district court dismissed this case as moot in light of the Board's intervening final decision in the underlying unfair labor practice proceeding. App., *infra*, 1a-4a. Petitioner did not appeal the district court's judgment of dismissal. Having elected not to file an appeal in the court below, petitioner lacks a jurisdictional basis for seeking review of the district court's mootness ruling in this Court.[7] The petition for certiorari should be denied on that ground alone.

---

[7] If petitioner had appealed the district court's mootness ruling to the court of appeals, it could have petitioned this Court for review before judgment was rendered by the court of appeals. See 28 U.S.C. 2101(e) (authorizing application for a writ of certiorari to review a case before judgment has been rendered in the court of appeals); Sup. Ct. R. 11 (review before judgment has been entered by court of appeals "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court"). As the Court has explained, the chief requisite for the exercise of its power to review a case before judgment by the court of appeals is that there be a case pending in the court of appeals,

In any event, contrary to petitioner's contention (Pet. 17), this case does not fall within the narrow exception to the mootness doctrine for disputes that are "capable of repetition, yet evading review." See, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546-547 (1976). As this Court has explained:

> [I]n the absence of a class action, the "capable of repetition, yet evading review" doctrine [is] limited to the situation where two elements combine[]: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

Weinstein v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). Accord *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam). This case does not meet the second element of the test; there is no "reasonable expectation" that, in the future, the Regional Director will issue an unfair labor practice complaint against petitioner, and that the violations alleged in that (putative) complaint will be of sufficient severity to cause the Regional Director to elect to seek Section 10(j) relief against petitioner in federal court. To the contrary, it should be presumed that petitioner will henceforth conduct its labor-relations affairs in a lawful manner. Cf. Pet. App. 70a (apart from the events that gave rise to this case, petitioner

---

i.e., that a notice of appeal has been filed and that the case is properly docketed in the court of appeals. *Gay* v. *Ruff*, 292 U.S. 25, 30 (1934). Here, petitioner has failed to file a notice of appeal from the district court's dismissal order, which was entered on July 23, 1996 (see App., *infra*, 2a), and such an appeal would now be out-of-time. See Fed. R. App. P. 4(a)(1).

has enjoyed "a history of amicable relations with unions"); *id.* at 18a, 61a.[8]

As we demonstrate below, the court of appeals' decision in this case would not warrant the exercise of this Court's power of discretionary review in the absence of a suggestion of mootness. Because the Court would not otherwise grant review in this case, it is neither necessary nor appropriate for the Court to disturb the judgment of the court of appeals merely because the controversy has subsequently become moot. Accordingly, the petition should be denied. See *Dove* v. *United States*, 423 U.S. 325 (1976) (per curiam).[9]

---

[8] *Miller* v. *California Pacific Medical Center*, *supra*, cited by petitioner (Pet. 17), is inapposite. There, the district court granted a Section 10(j) injunction against the employer, a panel of the court of appeals reversed, the court then granted the Board's petition for rehearing *en banc*, and the Board subsequently issued its final order. 19 F.3d at 451, 452-453. The court found that the case was not moot because the employer was "still in the process" of the corporate restructuring that had given rise to the then-concluded unfair labor practice proceeding before the Board. As a result, there was "a reasonable expectation that another labor dispute will arise and the Board may again seek § 10(j) relief" against the employer. *Id.* at 454. No analogous circumstances obtain here.

[9] Because the decision whether to grant review on any issue (including mootness) is discretionary with this Court, Sup. Ct. R. 10, we consistently have argued that the Court should deny review of cases that have become moot after the court of appeals entered its judgment but before this Court has acted on the petition for a writ of certiorari, when such cases do not present any question that would independently be worthy of this Court's review. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900) (arguing that Court should deny certiorari in moot cases that would not have warranted review on the

2. Petitioner's principal contention (Pet. 8, 9-13) is that the court of appeals' decision conflicts with those of other circuits insofar as it ordered the granting of an injunction under Section 10(j) without a showing of "reasonable cause" to believe that petitioner had violated the Act. Although there is disagreement among the courts of appeals as to the appropriate legal analysis governing the issuance of Section 10(j) injunctions, that disagreement would not warrant this Court's review of the judgment of the court of appeals in this case.

The courts of appeals have adopted different approaches in determining whether the Regional Director is entitled to a Section 10(j) injunction in a given case. Most of the circuits follow a two-step inquiry, determining, first, whether the Regional Director has demonstrated "reasonable cause" to believe that the party against whom relief is sought has violated the Act, and, second, whether the Regional Director has shown that an injunction would be "just and

---

merits); Robert L. Stern, et al., *Supreme Court Practice* § 18.5, at 724 n.29 (7th ed. 1993) (discussing *Velsicol* doctrine and stating that the Court appears to follow the practice urged in the government's brief in that case); but see 13A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3533.10, at 432-435 (2d ed. 1984 & Supp. 1996) (disapproving *Velsicol* doctrine and stating that vacatur under *United States* v. *Munsingwear*, 340 U.S. 36 (1950), is always appropriate when case becomes moot before Court grants certiorari). Denial of certiorari is especially appropriate in this case, because the petition neither requests, nor suggests the possibility of, vacatur under *Munsingwear* and, indeed, petitioner would lack a jurisdictional basis for doing so (see p. 11, *supra*). We have provided petitioner a copy of the United States' brief in opposition in *Velsicol*.

proper" in the circumstances. See, *e.g.*, *Conagra*, 70 F.3d at 158; *Silverman* v. *Major League Baseball Player Relations Committee, Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995); *Kobell* v. *Suburban Lines, Inc.*, 731 F.2d 1076, 1078 (3d Cir. 1984); *Frye* v. *Specialty Envelope, Inc.*, 10 F.3d 1221, 1224-1225 (6th Cir. 1993); *Arlook* v. *S. Lichtenberg & Co.*, 952 F.2d 367, 371-372 (11th Cir. 1992); *Boire* v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1188-1189 (5th Cir. 1975), cert. denied, 426 U.S. 934 (1976).[10]

In *Kinney* v. *Pioneer Press*, 881 F.2d 485 (1989), the Seventh Circuit adopted a different analytical approach. There, it concluded that "reasonable cause" is not a relevant consideration in Section 10(j) cases; rather, "[o]nce the Board seeks injunctive relief under § 10(j), the only question for the court is whether the Board has demonstrated that relief is 'just and proper.'" 881 F.2d at 493. In determining whether an injunction is "just and proper," the courts must "evaluate the propriety of the [Regional] Director's request with an eye toward the traditional equitable principles that normally guide such an inquiry." *Id.* at 490.[11] The court of appeals in this case followed

---

[10] The courts that follow this two-step framework differ with respect to the standard that they apply in determining whether an injunction is "just and proper": some hold that traditional equitable principles apply in determining the propriety of a Section 10(j) injunction, see *Conagra*, 70 F.3d at 164; *Kaynard* v. *Mego Corp.*, 633 F.2d 1026, 1033 (2d Cir. 1980), while others hold that those principles are inapplicable, see *Fleischut* v. *Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 & n.3 (6th Cir. 1988); *Suburban Lines*, 731 F.2d at 1078, 1091-1092.

[11] In excluding the "reasonable cause" inquiry from the Section 10(j) analytical framework, the court in *Pioneer Press* noted that "[t]he words 'reasonable cause' appear in § 10(*l*) but

Pioneer Press in ruling that a Section 10(j) injunction should issue. See Pet. App. 12a-13a & n.16. The Ninth Circuit has followed the Seventh Circuit's approach. See *Miller*, 19 F.3d at 456-460.

As the court noted in *Pioneer Press*, the "reasonable cause" inquiry parallels aspects of the "just and proper" inquiry and, therefore, does not meaningfully add to the Section 10(j) analysis:

> When courts apply traditional equitable principles to inquire whether an injunction is "just and proper" under § 10(j), no further purpose is served by asking the district judge, as a preliminary matter, to determine whether the [Regional] Director has established reasonable cause. * * * If the General Counsel's legal theory is inapt or if the facts are stacked against the agency's position (i.e., if there is truly no reasonable cause to believe someone has breached the NLRA), it's a safe bet that injunctive relief is not "just and proper" * * * because an injunction may not issue unless

---

not § 10(j)" of the Act, 881 F.2d at 489, and that the two provisions have different structures:

> The Board may invoke § 10(j) at its discretion whenever it believes someone has transgressed the NLRA, but may do so only after the General Counsel has filed an administrative complaint. Section 10(*l*), by contrast, is mandatory. It requires the Board to seek injunctive relief if an investigation yields "reasonable cause" to believe that secondary boycotts or other identified kinds of especially grave violations are in progress. * * *
>
> "Reasonable cause" is the trigger of the Board's duty under § 10(*l*).

Id. at 489-490. See also note 6, *supra*.

> the plaintiff has at least a modest chance of success on the merits.

881 F.2d at 491.[12]

Accordingly, there is no merit to petitioner's contention (Pet. 13) that, "[h]aving eliminated the 'reasonable cause' threshold, there is now no check upon the N.L.R.B. in the Seventh Circuit requiring it to show that it has sufficiently investigated a matter before initiating a Section 10(j) proceeding." Indeed, petitioner concedes (Pet. 14) that the Seventh Circuit acted properly in applying traditional equitable principles to determine whether the Regional Director's request for injunctive relief was "just and proper"; it faults the court only for not preliminarily engaging in the "reasonable cause" inquiry. See Pet. 9. As the Seventh Circuit noted in *Pioneer Press*, however, when traditional equitable principles are used in making the "just and proper" determination, a "reasonable cause" inquiry would simply be redundant. 881 F.2d at 491.[13]

---

[12] Similarly, the First Circuit, which applies traditional equitable principles in its "just and proper" analysis but continues to make an initial "reasonable cause" inquiry, has stated: "We find no fault in our sister circuits' rulings" omitting the latter inquiry. *Pye* v. *Sullivan Bros. Printers, Inc.*, 38 F.3d 58, 64 n.7 (1994).

[13] In 1967, the Court granted the Board's petition for a writ of certiorari in a case presenting the question whether traditional equitable principles are applicable in Section 10(j) injunction proceedings. The Court did not decide the issue in that case, however. See *McLeod* v. *General Elec. Co.*, 385 U.S. 533 (1967) (per curiam) (vacating court of appeals' judgment and remanding for further consideration in light of subsequent execution of collective-bargaining agreement). In this case, the

Nor did the court of appeals' exclusion of the "reasonable cause" inquiry affect the outcome in this case. "Reasonable cause" places a "relatively insubstantial" burden on the Board; to satisfy it, the Regional Director need only produce "some evidence" of a violation, and articulate a theory of liability that is "not frivolous." *Frye*, 10 F.3d at 1225; accord *Kobell*, 731 F.2d at 1084. Here, in the course of determining that an injunction was "just and proper" under traditional equitable principles, the court held that the Regional Director had demonstrated a likelihood of success on the merits of the unfair labor practice complaint and that the Regional Director's theories of liability rested on settled legal principles. See Pet. App. 17a; *id.* at 15a-25a. Those findings clearly establish that, had it engaged in the inquiry, the court would also have concluded that the Regional Director had demonstrated "reasonable cause" to believe that petitioner had committed the unfair labor practices alleged in the administrative complaint.

3. Petitioner also contends (Pet. 15) that the court of appeals erred in permitting the Regional Director to establish a "likelihood of success on the merits" by demonstrating a "better than negligible" chance of success. The court explained (Pet. App. 17a), however, that a "better than negligible chance" of success on the merits means "some likelihood" of success, and it went on to state that, "[o]nce the Director establishes some likelihood of success, 'the court must then determine how likely that success is, because this affects the balance of relative harms. * * * The more likely the plaintiff is to win, the less heavily

---

Board did not contest the Seventh Circuit's analytical framework in the courts below.

need the balance of harms weigh in his favor.'" *Id.* at 15a (quoting *Roland Machinery Co.* v. *Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984)). The court correctly applied those principles in concluding that the Regional Director "presented a case sufficient to justify injunctive relief and an interim bargaining order." Pet. App. 32a.

Petitioner is mistaken in suggesting (Pet. 15-16) that the decision below conflicts with the decisions of other courts of appeals. For example, petitioner's reliance on *Miller* v. *California Pacific Medical Center*, *supra*, is misplaced. There, the court adopted a rule quite similar to the one articulated by the court below. See 19 F.3d at 460 ("the Board can make a threshold showing of likelihood of success [on the merits] by producing some evidence to support the unfair labor practice charge"; "likelihood of success [on the merits] must be weighed against the possibility of irreparable injury"). Similarly, the standard applied by the First Circuit in *Rivera-Vega* v. *Conagra, Inc.*, *supra*, and *Pye* v. *Sullivan Brothers Printers, Inc.*, 38 F.3d 58 (1994), does not meaningfully differ from the one applied by the court of appeals in this case.[14]

---

[14] In *Conagra*, the court stated that, where "the interim relief sought by the NLRB is essentially the final relief sought, the likelihood of success should be *strong*." 70 F.3d at 164 (internal quotation marks omitted). In *Sullivan Brothers Printers*, the court stated that "interim relief in section 10(j) cases is not normally appropriate unless it is clear that ultimate success for the Board will not prove difficult." 38 F.3d at 67 (internal quotation marks omitted). In this case, the Board's decision upholding the allegations of the Regional Director's administrative complaint, on much the same evidentiary record as was before the court of appeals, strongly supports the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

NOVEMBER 1996

---

conclusion that her case against petitioner in the Section 10(j) proceeding satisfied the standard articulated by the First Circuit in *Conagra* and *Sullivan Brothers Printers*.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Case No. 3:94-CV-1037RM

UNITED STATES OF AMERICA, SAUNDRIA BORDONE, REGIONAL DIRECTOR OF THE TWENTY-FIFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ELECTRO-VOICE, INCORPORATED, RESPONDENT

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] Decision by Court. This action came before the Court. The decision has been rendered.

IT IS ORDERED AND ADJUDGED the court GRANTS petitioner's motion for voluntary dismissal and DISMISSES the petitioner's action.

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

July 23, 1996 Stephen R. Ludwig

By /s/ ANTHONY R. LEE
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Case No. 3:94-CV-1037RM

UNITED STATES OF AMERICA, SAUNDRIA BORDONE, REGIONAL DIRECTOR OF THE TWENTY-FIFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ELECTRO-VOICE, INCORPORATED, RESPONDENT

MEMORANDUM OF STATUS CONFERENCE

A status conference was held in this cause on July 22, 1996. Richard Simon represented the petitioner, and James Stadler represented the respondent. At Mr. Stadler's request, the court attempted to reach Jerry Smetna for the respondent, but Mr. Smetna was not available to take the call.

The court heard arguments on the petitioner's motion for voluntary dismissal. The court finds that final adjudication has occurred before the National Labor Relations Board, and that the petitioner's action under Section 10(j) of the National Labor

Relations Act is therefore moot. On this basis, the court GRANTS the petitioner's motion for voluntary dismissal (filed July 17, 1996 (#72)), and DISMISSES the petitioner's action.

SO ORDERED.

ENTERED: July 22, 1996

/s/ ROBERT L. MILLER, JR.
ROBERT L. MILLER, JR., Judge
United States District Court

cc: Steele/Simon
Barnes/Stadler

Supreme Court, U.S.
FILED
DEC 30 1996
CLERK

96-469

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ELECTRO-VOICE, INC.,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY OF ELECTRO-VOICE, INC. TO THE NATIONAL LABOR RELATIONS BOARD OPPOSITION

---

*Gerard C. Smetana
Law Offices Gerard C. Smetana
39 South La Salle Street
Suite 1218
Chicago, IL 60603
3 12-357-0250

Attorney For Petitioner

* Counsel of Record

13 pp

TABLE OF AUTHORITIES

Cases: PAGE

Doe v. Bolton, 410 U.S. 179 (1973) 5

Kinney v. Pioneer Press, 881 F.2nd 485 (7th Cir. 1989) 7

McLeod v. General Elec. Co., 385 U.S. 533 (1967) 8

Nebraska Press Ass'n. v. Stuart, 42 U.S. 537 (1976) 3

Roe v. Wade, 410 U.S. 113 (1973) 5

Southern Pacific Terminal Co. v. Interstate Commerce Comm., 219 U.S. 498 (1911) 2

Super Tire Engineering Co. v. McCorkle, 461 U.S. 115 (1974) 1, 2, 4, 5, 9

U.S. v. Munsingwear, 340 U.S. 36 (1950) 6, 7

Velsicol Chemical Corp. v. United States, 435 U.S. 942 (1978) 6

Attachment A

Only includes pages 31-33 beginning with sub-heading:

"Abusing the Board's 10(j) Authority"

From Statement of Labor Policy Association Dated: September 17, 1996

Before the Senate Labor and Human Resources Committee
Oversight Hearing of the National Labor Relations Board

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. 96-469

ELECTRO-VOICE, INC. PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY OF ELECTRO-VOICE, INC. TO THE NATIONAL LABOR RELATIONS BOARD OPPOSITION

We respectfully ask the Court to exercise its discretion not to find mootness as it did in Super Tire Engineering Co. v. McCorkle 461 U.S. 115 (1974) where the Court held that the issue of the constitutionality of State Welfare Assistance to Strikers was not rendered moot by the termination of

petitioner's particular strike. The Court there found as we ask the Court to find here, there is a likelihood of a recurrent impact on other employers citing Southern Pacific Terminal Co. v. Interstate Commerce Com. 219 U.S. 498 in which the Court held that short term orders of the Interstate Commerce Commission evasive of appellate review would not be considered moot. The underlying question presented here, what is the appropriate standard to be followed by a Federal District Court in determining whether or not a National Labor Relations Board Petition for discretionary injunctive relief under Section 10(j) should be granted is similarly a short term order that would otherwise escape review that would have a recurrent impact on other employers.

The underlying issue in Super Tire was whether the obtaining of welfare for strikers aiding one side to a labor dispute interfered with the balance of pain envisioned by the Labor Act after impasse was reached in bargaining. In Super Tire the Court recognized the short term nature of a strike

would always prevent review. Similarly in the instant case the short term nature of such injunctions will escape review as they expire by statutory mandate upon the NLRB's decision on the merits. The overriding policy reason to take this issue at this time is the erroneous nature of the standard promulgated by the Seventh Circuit in the instant case at a time of escalating use of the 10(j) injunction.[1]

The NLRB urges that the exception to the mootness doctrine regarding matters "capable of repetition yet evading review" is limited to the standard they quote from the Court's decision in Nebraska Press Ass'n. v. Stuart 42 U.S. 537 at 546-547 (1976) where the standard was limited to class actions or circumstances where Petitioner does not "have a reasonable

---

[1]The attached statement of the Labor Policy Association entitled the NLRB AN AGENCY IN CRISIS Presented to the Senate Labor and Human Resources Committee Oversight Hearing on the National Labor Relations Board dated September 17, 1996 demonstrated the improper tripling of the use of Section 10(j) petitions as a method of resolving labor law questions rather than the use of the administrative process. (See Attachment A)

expectation that the same complaining party would be subjected to the same action again" (see page 12 of NLRB's Opposition). An analysis more appropriate to the facts of this case is Super Tire, where similar to the instant case "the challenged governmental action has not ceased". (461 U.S. at 123)

The departure from the traditional equity standard by the 7th Circuit in denying 10(j) injunctive relief together with the failure to use a "reasonable cause" analysis as part of the "just and proper" requirement together with the escalating use of Section 10(j) creates a matter of imperative national importance this Court has not previously addressed. As stated in Super Tire:

> (The issue here) "... pervades every work stoppage, affects every existing collective bargaining agreement, and is a factor lurking in the background of every incipient labor

contract." (416 U.S. at 124)[2]

The NLRB in its Opposition suggests at page 18 that the 7th Circuit's and other circuit's failure to consider reasonable cause as part of the just and proper test creates an "insubstantial burden". It may be a burden easy to meet for purposes of Section 10(l) where the congressional design mandates the seeking of injunctive relief if there is "reasonable cause" to believe a secondary boycott exists. But the contrary is true under Section 10(j) where we contend the Board has the

---

[2] This Court's further rationale in support of exercising jurisdiction in Super Tire is equally applicable here:

> "Certainly, the pregnant appellants in Roe v. Wade, 410 U.S. 113 (1973) and in Doe v. Bolton 410 U.S. 179 (1973) had long since out lasted their pregnancies by the time their cases reached this Court. Yet we had no difficulty in rejecting suggestions of mootness. 410 U.S. at 125 ... and consistent results were reached (by the Court) ... (in) cases concerning various challenges to State election laws. The important ingredients in those cases was governmental actions directly affecting, and continuing to affect, the behavior of citizens in our society." 416 U.S. at 126

burden to demonstrate it has "reasonable cause" to believe that the circumstances requiring it to seek a petition for injunctive relief are and after meeting that "hurdle" the District Court must consider whether the injunction the Board seeks is "extraordinary" "just and proper". The "reasonable cause" standard in Section 10(j) cases has been utilized as a gateway by others circuits to prevent labor law "by injunction". Thus the importation of the reasonable cause standard from Section 10(1) into Section 10(j) as part of the just and proper standard is appropriate.

We respectfully suggest that the Solicitor General's discussion of Velsicol Chemical Corp. v. United States cert. denied. 435 U.S. 942 (1978) is misplaced. Similarly the failure of Petitioner to file for a "vacatur" under U.S. v. Munsingwear 340 U.S. 36 (1950) is inapposite. Petitioner in the instant case is not seeking merely to void the particular decision of the 7th Circuit but is asking the Court to review the entire underlying issue of what the appropriate standard is for federal district

courts in determining whether to grant or deny the government's petition under Section 10(j) of the Act given the "just and proper" language of the statute. U.S. v. Munsingwear arises only in circumstances where the Court has granted review and then determined the issue to be moot.

This case is not brought because there is "disagreement among the circuit courts of appeal as to the appropriate legal analysis governing the issuance of Section 10(j) injunctions, (see page 14 of Solicitor's Brief,) rather because the use of Section 10(j) injunctions by the Board as shown by the Statement of the Labor Policy Association, (Attachment A), has resulted in a serious abuse of process. Contrary to the 7th Circuit's decision in Kinney v. Pioneer Press 881 F.2nd 485 (1989) the determination of "reasonable cause" is a relevant consideration in Section 10(j) cases. It is the only way in which an employer can exercise its rights to take discovery or otherwise examine the underlying basis for the General Counsel's belief, that a particular case is proper and we urge

an "extraordinary" case for 10(j) injunctive relief.[3]

The Seventh Circuit's sliding scale balancing harm with the "better than negligible chance of success standard" supported by the Solicitor General in his Opposition is a balancing that does not really take place. This can be seen from the "balance" used by the Seventh Circuit in articulating the nominal nature of its public interest requirement stating:

> "In other words in examining whether an injunction is in the public interest the Court must weigh potential public benefits against the potential public costs. The public interest is furthered, in part, by ensuring that an unfair

---

[3]We respectfully ask this Court to revisit the decision it made in McLeod v. General Electric Co. 385 U.S. 533 (1967) in which the Court had granted a Petition for Writ of Certiorari raising the question of whether "traditional equitable principles" are applicable in Section 10(j) injunction petitions. Years later that issue not only is ripe for review but even more important in view of the increased utilization of Section 10(j) injunctions. See Petition in the instant case page 12 and Attachments A to this reply.

labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge." (See Petitioner's Appendix page 28a)

In conclusion this Court has never had occasion to address how the "just and proper" standard is to be properly administered by a Federal District Court under Section 10(j). This is a question of imperative national importance especially in view of the escalating use of Section 10(j).[4]

---

[4]In answer to the claim lack of jurisdiction raised in the Opposition at page 11 for Petitioners failure to appeal the District Court's mootness ruling, Petitioner asks the Court not to find this an impediment should the Court otherwise be satisfied that this case falls within the "capable of repetition, yet evading review" type of short term order relied on as a basis for this Super Tire decision.

In a case of "imperative public importance" we ask the Court in circumstances limited to cases involving short term orders evading review to waive the normal jurisdictional requirement suggested at page 7 footnote 11 of the Opposition as certiorari is sought from the Seventh Circuit use and creation of erroneous Section 10(j) standards, rather than a District Court, pro-forma holding following a remand.

Respectfully submitted,

Gerard C. Smetana
Counsel for Electro-Voice, Inc.,
Petitioner

Dated: December 23, 1996

ATTACHMENT A

THE NLRB: AN AGENCY IN CRISIS

STATEMENT OF THE LABOR POLICY ASSOCIATION

BEFORE THE SENATE LABOR

AND HUMAN RESOURCES COMMITTEE

OVERSIGHT HEARING ON THE

NATIONAL LABOR RELATIONS BOARD

BY

DANIEL V. YAGER

VICE PRESIDENT AND GENERAL COUNSEL

LABOR POLICY ASSOCIATION

SEPTEMBER 17, 1996

Attachment 1a to 5a
are Pages 31-33 of
the Statement as
Originally Submitted

Abusing the Board's 10(j) Injunction Authority

The Gould-Feinstein Board's disregard for the presumption of innocence on the part of employers was signaled shortly after the members were sworn into office by a marked increase in the use of injunctions under Section 10(j) of the NLRA. Heralded by a June 27, 1994, NLRB press release proclaiming "NLRB Injunction Activity Heats Up Under General Counsel Feinstein," [1]the Gould-Feinstein Board sought 134 10(j) injunctions from March 1994 to June 1996. This tripled the previous pace of 34 sought in fiscal year 1993. Only five were pursued against a union.

Section 10(j) authorized the Board to petition federal district courts for preliminary injunctions in cases where unfair labor practice complaints have been issued by the Board against either an employer or a union. The injunction remedy under Section 10(j) is intended to be available for extraordinary situations, since the party charged with the violation has not yet had a chance to prove his or her innocence. Thus, it can only be used to prevent "irreparable harm" where there is

[1]Towards the end of 1994, General Counsel Feinstein proclaimed: "I have made the increased utilization of Section 10(j) injunction proceedings a cornerstone of my administration of the Act." Report of the General Counsel on Case Handling Activity, March 3-November 25, 1994 (released Nov. 28, 1994) at 68.

"reasonable cause" that a violation has occurred.

As was stated by the late Frank W. McCulloch, NLRB chairman during the Kennedy-Johnson years (in which about 15 10(j) injunctions were sought per year), an injunction should be used-

> not as a broad sword, but as a scalpel, ever mindful of the dangers in conducting labor management relations by way of injunction.[2]

Moreover, the pursuit of a 10(j) injunction involves a significant commitment of NLRB General Counsel Rosemary Collyer:

> Section 10(j) litigation is more difficult and time consuming for Regional personnel than administrative litigation....Court papers must be flied within 48 hours of authorization to petition for an injunction, so the Regions inevitably go

---

[2]Frank W. McCulloch, "The NLRB in Action," Address before the Eight Annual Joint Industrial Relations Conference, Michigan State University (April 19, 1952) (cited in Herbert R. Northrop & H. Lane Dennard. "The Return of 'Government by Injunction'? Public Policy and the Expansive Use of Section 10(j) of the NLRA," 22 Employ. Rel. L.J. 101, 110 (Summer 1996)).

> filed within 48 hours of authorization to petition for an injunction, so the Regions inevitably go into "overdrive" as soon as a recommendation for 10(j) relief is forwarded to Washington. This activity saps each understaffed Region, as it devotes its best litigators to the Court action and copes with all other investigations and representation cases with a short staff....Stories abound about R-case hearings [i.e., hearings held prior to a union representation election] being postponed because a Region is tied up in knots over 10(j) litigation.[3]

One would assume that the abandonment of the presumption of innocence required in a 10(j) injunction action could only be justified in the most clear-cut situations. Yet the 10(j) rampage of the early Gould-Feinstein Board months involved a number of situations that were plainly less than clear cut violations of the Act:

- enjoining an employer from closing an operation before a union representation election, even

[3]Rosemary M. Collyer, "The Board's Use of §10(j) Injunctions," Address at the American Bar Association Meeting, Florida (Feb. 1995) at 10.

though the operation had lost millions of dollars and had been put on "probation" by the company well before any union organizing had begun;[4]

- ordering an employer to reinstate an employee allegedly discharged for union activity but later proven to have been fired for stealing a commission sale from a co-employee;[5]
- ordering an employer to reinstate an employee allegedly discharged for union activity but later proven to have been fired for provoking an altercation with a supervisor and threatening him;[6] and
- Requiring an employer to spend more than $6 million to restore unionized operations, which had been subcontracted, even though the company had lost $16 million on the operations in the 17 months leading up to the

---

[4]Miller v. LCF, Inc., 147 LRRM 2911 (N.D. Cal. 1994).

[5]Pye v. Jordan Marsh Stores Corp., No. 94-11509EFH (D. Mass. July 29, 1994).

[6]Zipp v. Caterpillar, Inc., 858 F Supp. 794 (C.D. Ill. 1994).

subcontracting and had subcontracted 97 percent of the work to unionized subcontractors.[7]

In each of these cases, the Board's requested injunction was denied by Mee Court, and, in those cases that have since been adjudicated (the first three), Hee employer has been found innocent of the allegation that prompted the injunction request.

The Gould-Feinstein Board's 10(j) assault ultimately backfired when Hee U.S. House of Representatives voted to include new restraints on the Board's injunction authority in the FY 1996 Labor HHS Appropriations measure. While the restrictions were not included in the FY 1996 Continuing Resolution, the number of 10(j) injunctions had declined significantly by the time that measure passed, and it was clear that the Board had received the message.

Despite this correction, the 10(j) experience illustrated the Board's disregard for the presumption of innocence historically guaranteed in our judicial system. The display of a similar attitude towards labor unions accused of labor law transgressions might have preserved the Board's image of neutrality. The Board's zeal for pursuing 10(j) actions, however, was directed almost universally at employers.

[7]Calarello v. "Automatic" Sprinkler Corp. of America, 55 F. 3d 208 (6th Cir. 1995) (injunction denied).